Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF NEW YORK, JASON TURNER, individually and in his capacity as Commissioner of New York City Human Resources Administration, GEORGE SANTIAGO, in his individual capacity,

Petitioners.

-against-

UNITED STATES OF AMERICA, NORMA COLON, MARIA E. GONZALEZ, TAMMY AUER, THERESA CALDWELL-BENJAMIN,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the holding to the United States Court of Appeals for the Second Circuit stating that WEP participants are employees with recourse to a remedy for discrimination pursuant to Title VII conflict with:

1) the federal common law criteria for employment, as stated in Johns v. Stewart, 57 F3d 1544 (10th Cir. 1995), O'Connor v. Davis, 126 F3d 112 (2d Cir. 1995) and elsewhere; and

2) the language of PRWORA, which limits applicable nondiscrimination provisions to four enumerated statutes, not including Title VII?

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Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit, from which petitioners seek certiorari, was decided on February 13, 2004. The opinion is reported at 359 F3d 83 (2d Cir. 2004), and appears in the Appendix at A1-52. Petitioners filed a petition for rehearing en banc. The Second Circuit denied that petition,

which denial was entered on May 27, 2004. It appears in the Appendix to this Petition at A55-74. [1]

Prior to trial, the United States District Court for the Southern District of New York, on March 8, 2002, granted the petitioners' motion to dismiss all claims against them. That opinion and order is not reported. It appears in the Appendix at A53-72.

JURISDICTION

The Second Circuit issued its judgment on February 13, 2004 (A1). The Second Circuit issued an order denying rehearing en banc on May 27, 2004 (A72-a). This Court has jurisdiction to review this judgment under 28 U.S.C. §1254.

STATUTORY PROVISIONS

The text of the following pertinent constitutional provisions and statutes may be found in the Appendix at A75-278.

United States Code

> **Title 42, Chapter 7, Sections 601 *et seq.*, Grants to states for aid and services to needy families with children and for child-welfare services**

New York Social Services Law

> **Section 330 *et seq.*, Public assistance employment programs.**

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[1] Numbers preceded by the letter "A" refer to the pages of the Appendix of this Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. Nature of Case

By complaint dated May 31, 2001, the United States commenced the instant suit alleging discrimination in violation of Title VII. The complaint names as individual complainants Tammy Auer, Tonja McGhee,[2] Maria Gonzalez, and Theresa Caldwell-Benjamin ("individual complainants"), all of whom were participants in New York City's Work Experience Program ("WEP") who filed complaints with the Equal Employment Opportunity Commission ("EEOC") alleging a hostile work environment.[3] The EEOC, in turn, referred the individual complainants to the Department of Justice. As relief, the complaint seeks compensatory damages for the individual complainants, and an order barring discriminatory practices in WEP and directing the instant petitioners (jointly referred to herein as "the City") to take such affirmative steps as may be necessary to prevent such practices. By motion dated July 12, 2001, accompanied by a complaint, plaintiffs Gonzalez, Auer, Caldwell-Benjamin, and McGhee subsequently sought to join the case as intervenors.

By motion dated July 20, 2001, the City sought dismissal of the action brought by the United States, on the

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[2] Ms. McGhee has since settled with petitioners and retains no claims.

[3] Solely for the purpose of this appeal, the City deems the factual allegations in the United States' complaint, and in the subsequent complaint filed by Tammy Auer, to be true.

ground that WEP workers are not "employees" under Title VII and that, consequently, the Court lacked subject matter jurisdiction, and the United States had failed to state a claim upon which relief could be granted .

By complaint dated September 28, 2001, plaintiff-appellant Norma Colon ("Ms. Colon") commenced an action against the City of New York, HRA Commissioner Jason Turner, and her work supervisor for sex discrimination in violation of, *inter alia,* Title VII. Although Ms. Colon had been one of seven WEP participants who originally complained to the EEOC, the U.S. Attorney, after conducting an investigation, had chosen not to include her claim in its suit against the City.

By similar motion dated November 13, 2001, the City sought to dismiss Ms. Colon's complaint. The grounds stated by the City were the same as had been asserted in the motion to dismiss the United States action.

For pre-trial purposes, the District Court consolidated the actions brought by Ms. Colon and by the United States.

B. Statement of Relevant Facts

WEP is designed to comply with requirements of the New York Social Services Law ("SSL"),[4] which in turn were designed to comply with requirements of the federal welfare reform act, known as the Personal Responsibility

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[4] Discrimination against work experience participants is illegal under SSL § 331(3). The City is strongly committed to enforcing this provision and to preventing discrimination against WEP participants.

and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-93, 110 Stat. 2105 (1996).

What is popularly termed "welfare reform" was established by the PRWORA and codified in relevant part in the Social Security Act at 42 USC. § 601, *et seq.* PRWORA created a new federally funded welfare program, Temporary Assistance to Needy Families ("TANF"), which replaced Aid to Families with Dependent Children ("AFDC").

The statutory purpose of PRWORA is set out at 42 U.S.C. § 601, which states: "The purpose of this part is to increase the flexibility of States in operating a program designed to:...." The statute then lists four program goals: 1) provide assistance to needy families so that children can remain in their own homes; 2) end the dependence of needy parents on government benefits through job preparation, work, and marriage; 3) prevent and reduce out-of-wedlock pregnancies; and 4) encourage two-parent families. Id.

In accordance with this statutory purpose, PRWORA contains an explicit prohibition of all federal regulation of state conduct and of all federal enforcement, other than as expressly provided in the act:

> § 617 Limitation on Federal authority:
>
> No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.

PRWORA defines an "eligible State" as one that has submitted a plan to the Secretary of Health and Human Services ("HHS") describing, *inter alia*, how the state will "conduct" a "family assistance program" designed to serve all political subdivisions in the State. 42 USC § 602(a)(1)(A)(i). The plan must include certifications by the chief executive officer of the state, concerning, *inter alia*, which state agencies will administer and supervise the family assistance program. § 602(a)(4). Each state receives a grant based on enumerated factors, § 603, and is subject to penalties, in the form of reductions in the grant amount, for noncompliance with PRWORA requirements. § 609.

In 1997, New York State enacted a welfare reform act that complies with TANF. L. 1997, c. 436. The State Commissioner of Labor is responsible for operating and administering public assistance work activities programs. SSL § 337. This provision is consistent with the general framework of the SSL, which provides that the State has overall charge of social services programs. SSL §§ 17(a); 20(2)(b); 20(3)(a); 34(3)(f). The City of New York is a local "city social services district," SSL § 61(1). Subject to reimbursement by the State, the City is responsible for providing assistance and care to anyone in the City who is in need of such support, which he "is unable to provide for himself." SSL § 62(1). However, "the local commissioners [of social services] act on behalf of and as agents for the State." Matter of Beudoin v. Toia, 45 NY2d 343 (1978). Local social services districts must submit to the State biennial plans for the provision of work activities programs. SSL § 333.

Under PRWORA, certain percentages of welfare recipients must participate in "work activities." 42 USC § 607(a). Twelve types of activities are defined as "work activities," 42 USC § 607(d); one is "work experience," which is described as follows: "work experience (including

work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available." 42 USC § 607(d)(4). Other listed work activities include job search and job readiness assistance, community service programs, and job skills training directly related to employment. 42 USC § 607(d)(6),(7),(9). It is noteworthy that "work experience" is distinguished from "unsubsidized employment," "subsidized private sector employment," and "subsidized public sector employment," each of which is listed as a separate and distinct work activity. 42 USC § 607(d)(1)-(3). The state law work activities provision tracks the federal provision in most significant respects, and refers to "work experience in the public sector or non-profit sector, (including work associated with refurbishing publicly assisted housing) if sufficient private sector employment is not available." SSL § 336(1)(d).

C. Federal Jurisdiction of the District Court.

The District Court had jurisdiction of the original action herein pursuant to 42 USC § 2000e-5(f) and 28 USC §§ 1331 and 1345.

D. District Court's Opinion and Order Granting the City 's Motion to Dismiss the Complaint.

By an opinion and order (one paper) dated March 8, 2002, the District Court granted the City's motion to dismiss the complaint in its entirety on the ground that the Court lacked subject matter jurisdiction and that the complaint fails to state a claim on which relief may be granted.

The District Court found it "unnecessary to make a broad determination about whether Congress intended for Title VII to apply to PRWORA," holding instead that "the

WEP participants herein cannot be considered 'employees' for Title VII purposes" (A65-66). Noting that Title VII protects from discrimination only those plaintiffs who are employees, the District Court looked initially to the prerequisite to the common law agency test, as articulated in O'Connor v. Davis, 126 F3d 112, 115 (2d Cir. 1997), *i.e.*, whether the working individual was actually hired by the defendant (A67-68). The District Court noted that there is not allegation in the pleadings that any of the plaintiffs were hired by the City, but that each was instead "assigned" to a work situation (A68)

Moreover, the District Court observed, the instant plaintiffs "did not receive employment-related benefits," such as sick pay, health insurance, vacation time, disability pension, survivors' benefits, group life insurance, or scholarships for their dependents upon their death (A69-70). Furthermore, "[i]f the participants did not comply with the WEP, their family's benefits were not terminated" (A70). Such benefits as plaintiffs did receive "resulted from their status as welfare recipients" (A70). The District Court concluded that, "[i]n the clear absence of either direct or indirect economic remuneration by the Defendants, the WEP participants here are not employees within the meaning of Title VII and their discrimination claim under that statute must fail" (A70-71).

E. The Opinion of the United States Court of Appeals for the Second Circuit

By opinion and order dated February 13, 2004, the Second Circuit, in a 2-1 decision, vacated the judgment of the District Court and remanded the case for further proceedings (A1-52).

The Majority Opinion Regarding Coverage under Title VII

The majority opinion disputed the conclusion of the District Court that the instant plaintiffs are not employees within the meaning of Title VII. Like the District Court, the majority cited O'Connor v. Davis, which holds that the plaintiff must show that she: 1) was hired by the putative employer, and 2) received remuneration for her work in some form (A15). The majority opined that because the plaintiffs had alleged that they "received cash payments and food stamps in return for their work for the city," and these "equaled the minimum wage times the number of hours the plaintiffs worked," plaintiffs had met the remuneration requirement (A16).[5] In addition, the majority stated, plaintiffs "received other benefits including transportation and child care expenses and eligibility for workers' compensation because of their work" (A16). Finally, the majority cited the EEOC compliance manual, which states: "A welfare recipient participating in work-related activities as a condition for receipt of benefits will likely be an 'employee'" (A17).

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[5] The majority's assertion that the payment received by a WEP participant correlates directly to the numbers of hours worked is a factual error. There is no required correlation between the number of hours a beneficiary is assigned to participate in WEP and the amount of assistance received. There is simply a ceiling on the number of hours the beneficary may work, that is equal to the amount of the cash assistance plus food stamps, divided by the minimum wage. SSL §336-c(2)(b). Beneficiaries may be assigned to work fewer hours.

In the majority's view, the instant plaintiffs are differently situated from those in Johns v. Stewart, 57 F3d 1544 (10th Cir. 1995), in which the court found that participants in a Utah public assistance program requiring the recipients' "participation in a broad range of adult education, short-term skills training, community work and job search activities" were not employees within the meaning of the Fair Labor Standards Act ("FLSA") (A19). The relevant distinction, according to the majority, are that: 1) "Johns is not a Title VII case and the workfare program was not governed by PRWORA"; 2) the Department of Labor, "the agency charged with interpreting the FLSA has rejected the Johns approach"; 3) Johns does not indicate "that the participants received the full range of benefits received by WEP participants or that they were required to perform useful work; and 4) "the Johns analysis . . . rest[s] on an artificial dichotomy: one must be either a welfare recipient or an employee and cannot be both" (A20).

The majority also purported to distinguish Brukhman v. Giuliani, 94 NY2d 387 (2000), "in which the New York Court of Appeals found that WEP participants are not employees within the meaning of a New York constitutional provision requiring contractors and subcontractors performing public work to pay their employees the prevailing wage for their work" (A21). The relevant difference, according to the majority, is that unlike Article I § 17 of New York Constitution, which "grants special economic rights to certain classes of workers," Title VII "accords the basic civil right of freedom from discrimination to all employees employed by covered employers" (A21-22).

Also addressed by the majority was O' Connor v. Davis, 126 F3d 112 (2d Cir. 1997), in which the court held that a college student who received federal work

study funding while doing field work at a psychiatric hospital could not sue under Title VII. In the majority's view, the critical factor distinguishing O'Connor was that the psychiatric hospital was not affiliated with the college that gave federal funds to the student, whereas "the City is both the payor and the recipient of the plaintiffs' services in this case" (A22).[6]

The majority stated further that workers' compensation, under which program WEP participants receive benefits, "is typically associated with employment," and the fact that only partial benefits may be granted, N.Y. Soc. Serv. Law § 336-c(2)(c) "is not dispositive in light of this circuit's definition of an employee" (A23).

The majority rejected the applicability of 42 USC § 608(c), which provides that a penalty imposed against a person "by reason of the failure of the individual to comply

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[6] The majority's conclusion that the City is necessarily "the recipient of the plaintiffs' services" is again a factual error. Tonja McGhee, one of the original plaintiffs, who eventually settled, was given a work assignment with the New York City Housing Authority, which is a public benefit corporation, not a City agency. *See, e.g.,* A.H.A. General Construction, Inc. v. New York City Housing Authority, 92 NY2d 20 (1998). Ms. McGhee is but one example of any number of WEP participants who are assigned to non-City employers, whether public benefit corporations or private businesses. In these instances, the City is the payor but not the recipient of the participant's services. Thus, the majority's analysis leads to the implausible result that some WEP participants (those assigned to City agencies) are employees while others are not.

with a requirement under the State program funded under this part shall not be construed to be a reduction in any wage paid to the individual." In the majority's view, the critical consideration with regard to 608(c) is that "Congress could easily have said that the benefits at issue in this case may not be considered wages," but chose instead to state that "the *withholding* of benefits (to penalize workers may not be considered a reduction of wages." The majority stated that "the fact that a penalty imposed on an individual WEP participant may not be considered a reduction in wages does not imply that the individual does not receive wages in the first instance" (A24). In addition, according to the majority, § 608(c) has the virtue of "allow[ing] the state to impose the penalty [on a delinquent participant] without violating the minimum wage requirement" (A25).

Finally, citing Pietras v. Board of Fire Commissioners, 180 F3d 468, 473 (2d Cir. 1999), the majority asserted that "a person need not receive wages in order to be considered an employee under Title VII," and that "the applicability of Title VII turns on the substance of the relationship between plaintiffs and defendants, not on labels affixed by statutes." (A25).

The Majority Opinion Regarding Preemption

The majority also addressed the City's contention that the promulgation of PRWORA preempts the application of Title VII to WEP participants, an issue that the District Court had not found necessary to reach. The nondiscrimination statute of PRWORA is codified at 42 USC § 608(d), which states:

d) Nondiscrimination provisions

> The following provisions of law shall apply to any program or activity which receives funds provided under this part:
>
> (1) The Age Discrimination Act of 1975 (42 USC 6101 et seq.).
>
> (2) Section 504 of the Rehabilitation Act of 1973 (29 USC 794)
>
> (3) The Americans with Disabilities Act of 1990 (42 USC 12101 et seq.).
>
> (4) Title VI of the Civil Rights Act of 1964 (42 USC 2000d et seq.).

The majority rejected the City's argument that, under the principle of "expressio unius est exclusio alterius," the failure to include Title VII among the enumerated nondiscrimination provisions precludes the application of that statute. According to the majority, the enumerated provisions are dissimilar from Title VII in that they are "non-discrimination laws applicable to programs or activities that receive PRWORA funds" and that "include functions like education and vocational training" that do not involve an employment relationship (A27). Title VII, according to the majority, "governs employment relationships whether federally funded or not" (A27). This dissimilarity, in the majority's view, renders the "expressio unius" principle inapplicable.

The majority also disputed the City's reliance on 42 USC § 617, which provides that "[n]o officer or employee of the Federal Government may regulate the conduct of

States under this part or enforce any provision of this part, except to the extent expressly provided in this part." In the majority's view, § 617 applies only to the government's enforcement powers but does not restrict the freedom of WEP participants "to sue under Title VII or any other applicable statute."[7]

The majority also found no significance in Congress's failure to include in PRWORA a provision comparable to that in the former AFDC/JOBS program, which stated that "[i]n assigning participants . . . to any program activity . . . individuals are not discriminated against on the basis of . . . sex . . . and all participants will have such rights as are available under any applicable Federal . . . law prohibiting discrimination." H.R. Rep. No. 104-651 at 908. The majority opined that "[b]ecause the AFDC/JLBS program was repealed in its entirety, no particular significance attaches to the revocation of this provision" (A28).

The majority further failed to find in a 1997 amendment to PRWORA authorizing Welfare-to-Work ("WtW") grants, 42 USC § 603(a)(5), any Congressional intent that Title VII not apply to PRWORA participants. WtW provides that "an individual may not be discriminated

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[7] The majority's assertion that the right to sue under Title VII does not involve government enforcement ignores the requirement that, as stated by this Court, "the statutory 90-day period within which an aggrieved party must file a Title VII action does not begin to run until receipt of a right-to-sue letter [from the EEOC] and notification that that the Commission's conciliation efforts have failed." Thus, commencement of an action under Title VII entails specific government enforcement procedures.

against by reason of gender with respect to participation in work activities engaged in under a program operated with funds provided under this paragraph." 42 USC § 603(a)(5)(I)(iii). The majority concluded, however, that because WtW is not limited to activities that are normally considered employment, "[t]he nondiscrimination provision in WtW would . . . serve a useful purpose even if Title VII were available to protect employees" (A29).

The majority also cited WtW's legislative history for the proposition that Congress intended no preemption. Of significance to the majority was Congress's failure to enact specific proposed language stating that a WtW recipient is not to be considered an employee (A30). The majority noted further that the Congressional Conference Committee declined to explicitly override a determination by the Department of Labor that "workfare participants may be covered 'employees'" (A31).

In addition, the majority gave weight to certain regulations enacted by the Department of Labor ("DOL") and the Department of Health and Human Services ("HHS"). Both agencies have regulatory provisions applying Title VII protections to PRWORA. The majority expressed its disagreement with the District Court, which had found that "because HHS and DOL have no authority to define Title VII's coverage, the regulations are not binding." In the majority's view, it is "well within the respective agency's authority" to determine "the manner in which discrimination claims are to be processed and the lack of preemptive effect attributable to Section 617. . ." (A32).

Finally, the majority disputed the City's contention that, in each instance, the agency's determination that Title VII was applicable represented a shift from a prior position. According to the majority, after initially "declin[ing" to reference Title VII in its regulations because it is not

charged with enforcing Title VII," HHS revised its regulations "only to clarify that PRWORA did not preempt Title VII's protection of employees who also receive TANF funds" (A35). The majority acknowledged that "DOL did not mention Title VII in the interim final version" of its regulations enacted under the 1997 amendment, but stated that this omission was merely because "some WtW participants may not be employees and thus may not be covered by Title VII" (A33).

The Dissent.

The dissenting opinion argued that under the terms of PRWORA itself WEP participants are not "employees" covered by Title VII. Contending that "[t]he welfare benefits received by WEP participants are not wages because [PRWORA] says they are not," the dissent cited 42 USC § 608(c), which states: "A penalty imposed by a State against the family of an individual by reason of the failure of the individual to comply with a requirement under the State program funded under [PRWORA] shall not be construed to be a reduction in any wage paid to the individual." The dissent criticized the majority for "reject[ing] the most natural and direct reading of the text; no wording can be framed by Congress to withstand an aggressive misreading" (A44).

The dissent argued further that, as acknowledged by the majority, benefits such as child care and carfare "are necessary only because the [welfare] recipient works" (A37). Citing O'Connor v. Davis, 126 F3d 112, 115-16 (2d Cir. 1997) ; York v. Association of the Bar, 286 F3d 122, 125-26 (2d Cir. 2002), and Pietras v. Board of Fire Commissioners, 180 F3d 468 (2d Cir. 2002), the dissent noted under the Circuit's case law, "things that are needed only because someone does work (such as the provision of a desk or a parking space) do not count in assessing

whether a person is receiving 'substantial benefits' amounting to remuneration" (A37). In the words of the dissent: "The WEP benefits cited by the majority opinion . . . do not even raise an issue of fact: they are wholly incidental to WEP participants' workfare assignments and they chiefly benefit the City. Such benefits cannot be deemed compensation in lieu of wages; no one needing gainful employment could work for such a package" (A46).

As for the extent to which WEP participants are entitled to workers' compensation, the dissent argued, citing US v. Demko, 385 US 149 (1966), that "[w]orkers' compensation is chiefly a benefit for the employer: without it, WEP participants could sue the City for tort damages" (A47).

The dissent observed as well that since protection from discrimination is already secured for WEP participants by New York State law, N.Y Soc. Services Law § 331(3), "[t]he majority's conferral of employee status on WEP participants offers no incremental protection from sex discrimination" (A38). The dissent proceeded to argue: "Since the protection against sexual discrimination afforded by the majority opinion is redundant, the only likely impact of this case will be to frustrate important welfare reforms by impairing the flexible and temporary nature of WEP assignments" (A38). Thus, for example, according to the dissent, "[i]f WEP participants are employees under federal common law, it may then follow – and it will certainly be argued – that they have a right like other employees, to unionize" (A38).

In the view of the dissent, the instant case is indistinguishable from O'Connor, in which the Second Circuit "explicitly rejected the arguments [i] that receipt of federal work study funding . . . was sufficient to make her a hospital employee and [ii] that such a governmental benefit could be considered compensation." 126 F3d at 116, n.2.

The dissent argued that the majority's attempt "to distinguish O'Connor on the ground that here 'the City is both the payor and the recipient of plaintiffs' services" is unavailing because it "glides over the dispositive question: just what is being *paid?* As O'Connor holds, unless the payor is being paid *compensation,* the payee is not an employee [emphasis in original]" (A41). As noted by the dissent, O'Connor "held that work study funding did not support an inference of employment even though the funding was calculated on the basis of the number of hours worked" (A43). [8] 126 F3d at 112, n.2.

Also futile, in the view of the dissent, was the majority's attempt to distinguish Brukhman v. Giuliani, 94 NY2d 387 (2000), on the ground that it would be "foolhardy to assume that the New York Court of Appeals would extend its interpretation of the prevailing wage provision [of the New York Constitution] to Title VII." The dissent cited categorical language in the Brukhman opinion, which states: "[WEP] participants simply are not 'in the employ of' anyone – that is the very reason they are receiving welfare benefits and required to participate in the Program, until they can find or be placed in jobs with the customary array of traditional indicia of employment" (A41). Id. at 395.

The dissent noted further that, in light of Johns v. Stewart, 57 F3d 1544 (10th Cir. 1995), the majority opinion has created a split in the circuits (A48). The dissent rejected the majority's attempt to distinguish Johns as a case under the FLSA, rather than Title VII, noting that "the definition of 'employee' in the FLSA is considerably more inclusive than the common law definition used in Title VII

[8] See footnote 5.

. . . . The Johns analysis is therefore applicable *a fortiori*"(A49)

As for the majority's observation that DOL has implicitly rejected Johns, the dissent noted that this purported rejection occurs in a DOL "Guidance," which, as "the majority concedes . . . [is] entitled to no deference beyond [its] 'power to persuade." Moreover, according to the dissent, '[t]he (hedged) assertion in the DOL guidance is without an express or implied basis; it is unpersuasive because that which does not explain cannot persuade" (A50).

The dissent also dismissed the majority's speculation that the Johns plaintiffs may not have "received the full range of benefits owing to WEP participants" and that they may not have been "required to perform useful work." According to the dissent, "[t]he phrase 'full range of benefits' is an absurd misdescription; and the relevant passage in Johns gives no support to the majority's speculation about the nature of the benefits received or the work performed by the plaintiffs" (A50). The passage cited by the dissent states: "Although [the workfare] participants may perform the same function as regular employees at some of the projects to which they are assigned, they differ from state employees in that they do not receive the same salary, safe working conditions, job security, career development, Social Security, pension rights, collective bargaining, or grievance procedures as do the actual employees." Johns, 57 F3d at 1559.

Finally, the dissent rebutted the majority opinion's "suggest[ion] that Johns rested on an 'artificial dichotomy' between employment and WEP participation." As noted by the dissent, "the Johns court stated – as a matter of fact, not presumption – that the workfare participants at issue 'were completely unlike state employees in every respect" (A51). Johns, 57 F3d at 1558-59.

Having found, based on the federal common law indicia of employment, that WEP participants do not have recourse to Title VII protections, the dissent refrained from addressing the majority's preemption analysis.

F. The City of New York's Petition for Rehearing En Banc

On March 2, 2003, the City filed a petition in the Second Circuit for rehearing en banc. The petition argued that the majority decision directly contradicted the Circuit's established case law.

On May 27, 2004 , the Second Circuit denied the City's petition for rehearing en banc.

REASONS FOR GRANTING THE PETITION

By defining participants in WEP as "employees" under federal common law, the Second Circuit has limited the City's ability to conduct the program in a manner optimally calculated to serve its intended purpose, *i.e.,* to provide recipients with the training and experience that will enable them to achieve autonomy through gainful employment. As stated by the dissenting opinion below, "the only likely impact of this case will be to frustrate important reforms by impairing the flexible and temporary nature of WEP assignments." Citing 29 USC § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . ."), the dissent observed further that under the definition of "employee" advanced by the majority, an attempt by WEP participants to unionize is virtually inevitable. Such a development could cripple WEP.

Moreover, the majority opinion's designation of WEP participants as "employees" is based on a deeply flawed analysis of the indicia of employment as they apply in this case, and flies in the face of well-established case law. Similarly, the majority's preemption analysis, though not addressed by the dissent, conflicts with basic tenets of statutory construction.

Finally, as noted by the dissent, the majority opinion opens a split between the Second and Tenth Circuits. Despite the majority's unpersuasive attempt to distinguish Johns v. Stewart, 57 F3d 1544 (10th Cir. 1995), the Tenth Circuit's holding that workfare participants are not employees pursuant to the FLSA, stands in direct contradiction to the majority determination in this case. The split between circuits compounds the pressing nature of the need for a granting of certiorari.

Indicia of Employment Under Title VII.

As demonstrated by the dissent's careful analysis of the majority's reasoning, the majority's determination that WEP participants are employees under Title VII is deeply flawed and inconsistent with established case law.

Title VII defines an employee as "an individual employed by an employer." 42 USC § 2000e(f) (1994). In Johns v. Stewart, 57 F3d 1544 (10th Cir. 1995), the Tenth Circuit was asked to decide whether welfare beneficiaries who participated in a work experience program had an employment relationship with the government. The Court held that the work experience component of the relationship cannot be examined in isolation. Work experience is just one component of a comprehensive assistance plan, and it is the overall nature of the relationship between government and beneficiary that must be examined. Id. at 1558. On that basis, the Tenth Circuit

held that the plaintiffs in Johns were not employees. When the similar overall relationship here is examined, it is apparent that the plaintiff WEP participants are likewise not employees.

TANF is a means-tested welfare or public assistance program, in which assistance is provided to needy families. 42 U.S.C. § 601(a). The circumstances under which assistance is provided, and reduced or terminated, are not compatible with an employment relationship. The assistance is provided to the family, not to an individual. § 608(a)(1). In the WEP program, if TANF recipients are sanctioned for failure to perform their WEP assignments, the assistance to the other members of the household is not reduced; only that portion of the assistance provided for the non-complying individual is reduced or discontinued. SSL § 342; 12 NYCRR §§ 1300.12(b)(2),(4),(6); 1300.12(d)(1); 1300.12(e)(2),(3); 42 USC § 607(e)(1)(A). Thus, assistance continues, even though no WEP assignment is performed. Further, PRWORA explicitly states that reductions of assistance imposed as a penalty for noncompliance (for any reason) "are not considered wage reductions" and "shall not be construed" as such. 42 USC § 608(c). As observed by the dissent in this case, the majority's assertion that the benefits granted to WEP participants are nonetheless wages is an "aggressive misreading" that "reject[s] the most natural and direct meaning of the text."

PRWORA also mandates that the state reduce or eliminate assistance as a sanction for a variety of reasons that have nothing to do with an employment relationship: for noncooperation in establishing paternity or obtaining child support, § 608(a)(2); for failure to assign to the State any rights to support from any other person, §608(a)(3)(A); and for violating a condition of probation or parole, § 608(a)(9). For recipients who are teenage parents, the state

must reduce or eliminate assistance, if they do not attend high school or an approved alternative training program, § 608(a)(4), or do not reside with a parent, other adult relative or legal guardian, § 608(a)(5)(A). Further, the state must deny assistance for ten years to persons convicted of having fraudulently misrepresented their residence to simultaneously receive benefits in two or more states, § 608(a)(8). The statute also provides that assistance shall be reduced or eliminated for failure to engage in work activities. § 607(e).

Case law involving work experience programs supports the conclusion that work experience is not employment. In Brukhman v. Giuliani, 94 NY2d 387 (2000), a case which involved the WEP program in New York City and a State prevailing wage statute, the New York Court of Appeals stated:

> ...[workfare] participants simply are not "in the employ of" anyone--that is the very reason they are receiving welfare benefits and required to participate in the Program, until they can find or be placed in jobs with the customary array of traditional indicia of employment.

As observed by the dissent, this language refutes the majority's conclusory assertion that "it would be foolhardy to assume that the New York Court of Appeals would extend its interpretation of the prevailing wage provision to Title VII."

In the pertinent case of Johns v. Stewart, 57 F3d at 1557, the issue was whether welfare beneficiaries participating in a Work Experience and Training project

were employees for purposes of the Fair Labor Standards Act ("FLSA"). Johns is particularly noteworthy because the FLSA contains an exceptionally broad definition of employee, a definition considerably broader than that contained in Title VII. *See* 29 USC §§ 203(g), (e); (defining "employ" under the FLSA as including "to suffer or permit to work" and "employee" as 'any individual employed by an employer"); Frankel v. Bally, Inc., 987 F2d 86, 89 (2d Cir. 1993) ("Title VII do[es] not contain the same expansive definition of the term 'employ' used in the FLSA."); *see also* Nationwide Mutual Insurance Company v. Darden, 503 US 318, 326 (1992). As noted by the dissent, the breadth of the FLSA definition makes the Johns analysis applicable to the Title VII *a fortiori,* and renders futile the majority's attempt to distinguish that case. Despite that very breadth, the Tenth Circuit found that "[t]he overall nature of the relationship between Plaintiffs and Defendants is assistance, not employment. Indeed, [work experience] participants are completely unlike state employees in every respect." Id. at 1558.

The court then enumerated the ways in which participants are unlike employees. They apply for public assistance, not a state job, and receive their assistance checks through the social services payment system, not from the state payroll. Taxes are not withheld from their benefits and they do not accrue sick or annual leave. Recipients also do not have job security, career development, Social Security, pension rights or collective bargaining. Id. at 1558-59. The court noted that as a condition for receipt of benefits in that program, recipients were required to meet a needs test; be unemployable, marginally employable or over sixty years old; have no dependent children and be able to perform work experience and agree to participate in education, skills development, and job training. Id.

Similar conditions exist here. Participants apply for public assistance, not a job. They are not required to participate in work experience if they are incapacitated or over sixty-years-old, have a child who is under one-year-old, or have to attend to an ill or incapacitated member of the household. SSL § 332(1). The social services district is required to provide participants with available supportive services, including transportation and child care, to enable them to participate in the program. SSL § 332-a. Participants are also required to cooperate in establishing paternity and enforcing child support obligations, SSL § 334(2), and in an assessment, by the social services district, of their need for supportive services, their skills and experience. SSL §335(3). Participants must also participate in work activities, which in addition to work experience, may include: subsidized or unsubsidized employment; job search activities; on-the-job training; community service activities; vocational educational training and job skills training. SSL § 336(1). Participants who have not obtained a high school diploma may be required to attend educational activities. SSL § 336-a. Refusal to comply with any of these requirements may lead to a reduction or termination of benefits. SSL § 342.

It is also self-evident that participants in these interim assignments do not have job security, career development, Social Security or pension rights, and that taxes are not withheld from their benefits. Further, the New York City Board of Certification of the Office of Collective Bargaining, which administers public sector labor relations in New York City, New York City Administrative Code, New York City Collective Bargaining Law § 12-301, *et seq.*, held that participants in an earlier work experience program were not entitled to be represented for collective bargaining. District Council 37 v. City of New York, New York City Board of Certification, Decision 21-81 (1981).

In addition, under SSL § 342, a WEP participant's family continues to receive non-cash benefits despite the participant's failure to perform a work assignment, undermining the contention that such benefits are provided as remuneration. Benefits that are not contingent upon the performance of work cannot be deemed payment for that work.

Contrary to appellants' contention, the benefits at issue in this case -- *i.e.*, the cash grant, certain child care expenses, workers' compensation, and monetary reimbursement for transportation costs -- are not "job-related" but, rather, "need-related." The very title of the program, "Block Grants to States for Temporary Assistance for Needy Families" 42 USC, Subchapter IV, Part A, emphasizes the need-based nature of these benefits. This is "a means-tested welfare or public assistance program." 42 USC § 608a. The amount of benefits provided is not based on the amount or type of work experience performed, but is based solely on the need of the recipients.[9] The benefits are provided if the individual performs no work experience, but instead is assigned to a different work activity, such as vocational educational training or job search and job readiness assistance. 42 USC § 607(d)(6),(8). Thus, the benefits cannot plausibly be regarded as remuneration for work.

The nondiscrimination provisions of PRWORA, 42 USC § 608(d).

As already noted herein, Title VII is conspicuously absent from the nondiscrimination statues enumerated in 42

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[9] See footnote 5.

USC § 608(d). Since Title VII is well known to Congress, its absence can hardly have been an oversight.

The language of § 608(d) is unambiguous. Under the heading labeled "nondiscrimination provisions" are listed four nondiscrimination statutes. For the purposes of determining the applicability of Title VII, the relevant rule of statutory construction is "*expressio unius est exclusio alterius*" (the expression of one thing is the exclusion of another) also applies here. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 US 163, 167 (1993) the statute at issue was Fed.R.Civ.P. 9(b), which enumerates two types of actions to which the statute applies. The Supreme Court held that an action that was not enumerated, was not covered, citing "*expressio unius est exclusio alterius*." In the instant case that principle dictates that Title VII is not among the federal statutes to which individuals covered by PRWORA have recourse.

The reasoning cited by majority opinion for its conclusion that "*expressio unius*" is inapplicable in this case does not withstand scrutiny. According to the majority, Title VII does not "go hand in hand" with the enumerated statutes, and its absence from the list is consequently without significance. But the category that unites the enumerated items, and which is explicitly stated by the statute itself, is "nondiscrimination provisions," a rubric under which Title VII unquestionably falls and which entitles it to "go hand in hand" with the statutes enumerated.

Moreover, in its attempt to show that Title VII is in a category separate from that of the other enumerated statutes, the majority proposed distinctions that are inaccurate. As characterized by the majority, the enumerated statutes are "non-discrimination laws applicable to programs or activities that receive PRWORA

funds" and that "include functions like education and vocational training" that do not involve an employment relationship (A27). The majority sees Title VII as distinct in that the statute "governs employment relationships whether federally funded or not" (A27). Yet the ADA and the ADEA apply both to federally and non-federally funded employment programs. In addition, the ADA applies to both federally and non-federally funded non-employment programs. Thus the distinctions advanced by the majority are not correct.

The majority has failed to advance any plausible argument to show that "*expressio unius*" should not apply in this instance. Accordingly, the terms of PRWORA itself excludes Title VII from the list of federal nondiscrimination remedies available to WEP participants.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to grant its petition for a writ of certiorari.

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August 26, 2004

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: February 5, 2003 Decided: February 13, 2004)

Docket Nos. 02-6102 (L); 02-6112, 02-6122, 02-6124, 02-6126, 02-7405 (Con)

UNITED STATES OF AMERICA, NORMA COLON,

Plaintiffs-Appellants,

MARIA E. GONZALEZ, TAMMY AUER, THERESA CALDWELL-BENJAMIN,

Intervenors-Plaintiffs-Appellants,

—v.—

CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, JASON TURNER, individually and in his capacity as Commissioner of the New York City Human Resources Administration, GEORGE SANTIAGO, in his individual capacity,

Defendants-Appellees.

Before:

JACOBS and POOLER, *Circuit Judges*,
GLEESON, *District Judge*.*

The United States, on behalf of four participants in New York City's Work Experience Program, a mandatory welfare work program, and an individual participant sued the city, the New York City Housing Authority and certain city officials, alleging sexual and racial harassment in violation of Title VII of the Civil Rights Act of 1964. After finding that the participants were not employees within the meaning of Title VII, the district court (Richard Conway Casey, *Judge*) dismissed their complaints.

Vacated and remanded. Judge Jacobs dissents in a separate opinion

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* The Honorable John Gleeson, United States District Judge for the Eastern District of New York, sitting by designation.

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Washington, D.C., *for Amici Curiae AFL-CIO, New York State AFL-CIO, Lawyers' Committee for Civil Rights Under Law, Mexican-American Legal Defense and Educational Fund, National Asian Pacific American Legal Consortium, National Employment Law Project, National Partnership for Women & Families, National Women's Law Center, National Workrights Institute, and Women Employed.*

POOLER, *Circuit Judge*:

We are asked to determine whether welfare recipients obliged to participate in New York City's Work Experience Program ("WEP") are employees within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and thus entitled to Title VII's protections against sexual and racial harassment. Applying this circuit's test for the existence of an employer-employee relationship, we conclude that the district court erred by finding as a matter of law on a Rule 12(b)(6) motion that plaintiffs are not employees. We also conclude that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which requires participation in certain work activities including programs like WEP as a condition of the receipt of welfare benefits, does not evince an intent to deprive these workers of Title VII's civil rights protections. Our conclusion accords with the conclusions reached by the federal agencies charged with enforcing Title VII and PRWORA. We therefore vacate the judgment and remand for further proceedings.

BACKGROUND

The Statutory Framework of the Work Experience Program

In 1996, Congress enacted, and the president signed, PRWORA. This act ended the previous program for providing assistance to needy families, Aid to Families With Dependent Children ("AFDC"), and authorized a new and time-limited program, Temporary Assistance to Needy Families ("TANF").

The purpose of the new program is "to increase the flexibility of States in operating a program designed to" meet certain goals including "end[ing] the dependence of needy parents on government benefits by promoting job preparation, work, and marriage." 42 U.S.C. § 601(a). As a condition of receiving TANF grants, states must ensure that certain percentages of families participate in work activities. 42 U.S.C. § 607(a). "Work activities" include: unsubsidized employment; subsidized private sector employment; subsidized public sector employment; work experience; on-the-job training; job search and job readiness assistance; community service programs; vocational education; job skills training; education related to employment (for individuals without high school degrees or high school equivalency certificates); secondary school attendance or study leading to an equivalency certificate; and provision of child care services for individuals participating in community service programs. 42 U.S.C. § 607(d)(1)-(12). When an individual refuses to participate in a work activity, PRWORA requires the state to "(A) reduce the amount of assistance otherwise payable to the family pro rata (or more, at the option of the State). . . ; or (B) terminate such assistance, subject to such good cause and

other exceptions as the State may establish." 42 U.S.C. § 607(e)(1). Section 608(c) provides that such a reduction "shall not be construed to be a reduction in any wage paid to the individual."

PRWORA also provides under the caption, "Nondiscrimination provisions":

> The following provisions of law shall apply to any program or activity which receives funds provided under this part:
>
> (1) the Age Discrimination Act of 1975, (42 U.S.C. 6101 et seq.)
>
> (2) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).
>
> (3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.)
>
> (4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)

42 U.S.C. § 608(d).

Finally, PRWORA limits federal enforcement authority as follows: "No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part." 42 U.S.C. § 617.

New York has implemented PRWORA through Chapter 55 of the Social Services Law. However, New York's work requirements apply not only to families with children, as does TANF—the federal welfare program created by PRWORA—but also to households without dependent children that consequently receive only state funding. N.Y. Soc. Serv. L. § 335-b(1). A recipient who refuses to engage

in a work activity incurs a pro rata reduction of his household's grant. NY Soc. Serv. L. 342(2),(3).

As an alternative to other "work activities" authorized by PRWORA and by state statute, New York social services districts may require recipients of public assistance to participate in "work experience in the public sector or nonprofit sector." N.Y. Soc. Serv. L. § 336 (1)(d). In order to calculate the number of hours a recipient may be required to participate in a work experience activity, New York divides the amount of assistance payable to the recipient including food stamps by the higher of the federal minimum wage or the state minimum wage. N.Y. Soc. Servs. L. § 336-c(2)(b). In addition, New York human resource agencies can assign recipients to a given task only if they are "provided appropriate workers' compensation or equivalent protection for on-the-job injuries and tort claims protection on the same basis, but not necessarily at the same benefit level, as they are provided to other persons in the same or similar positions," and "the project to which the participant is assigned serves a useful public purpose." N.Y. Soc. Serv. L. § 336-c(2)(c)&(d). WEP participants also receive authorized child care expenses and transportation expenses.

Plaintiffs' Allegations

Because a Rule 12(b)(6) motion tests only the adequacy of the complaint, we summarize plaintiffs' claims in some detail. *See Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001).

Tammy Auer

In January 1997, New York City's Human Resources Administration ("HRA") assigned Tammy Auer to do

general office work at the City's Sanitation Department. Auer's supervisor, James Soto, immediately began to make inappropriate, sexually charged comments to Auer. He also asked her to move in with him and told her that they could make a beautiful baby. Each day Soto asked Auer to come into his office, instructed her to turn around, and then commented on her appearance.

During spring 1998, Soto escalated his behavior to inappropriate touching. Not only did Soto ignore Auer's objections, but he also warned her that he could terminate her WEP assignment. Auer complained to the Sanitation Department's Staten Island borough commissioner, who took no action. After she complained to the department's Manhattan office, she was transferred to a different facility. However, Soto, who continued to have supervisory responsibility for Auer, went to her new work site and screamed at her. He also instructed Auer's immediate supervisor not to give her any work to do. Shortly thereafter Auer quit because of the way she had been treated. She filed a complaint with the United States Equal Employment Opportunity Commission ("EEOC"), which after finding reasonable cause to believe her allegations were true, referred her charge to the United States Department of Justice ("DOJ"). *See* 42 U.S.C. § 2000e-5(f)(1) (authorizing EEOC to refer charges against governments, government agencies, and political subdivisions to the Attorney General).

Tonja McGhee

In April 1998, HRA assigned Tonja McGhee to work for the New York City Housing Authority ("NYCHA"). Three months later she began to perform a maintenance job at the Roosevelt Houses in Brooklyn. Within a month, McGhee

began a consensual sexual relationship with her supervisor, Choice Bennett. However, in August 1998, she broke off this relationship. Thereafter, Bennett called McGhee at home on a daily basis and threatened to "get her" if she did not resume the relationship. In addition, Bennett falsely informed his supervisor that McGhee was not doing her work.

In October 1998, Bennett directed McGhee to enter his office, turned off the lights, and told McGhee to take her pants down. McGhee ran out of the office. She also complained both to Bennett's supervisors and to a WEP coordinator about the harassing conduct. The WEP coordinator took no action, but one of Bennett's supervisors arranged for McGhee's transfer to a location several blocks away where Bennett continued to call McGhee and to threaten her. McGhee made complaints to her supervisor, but the supervisor took no action. Therefore, in May 1999, McGhee stopped working at her assignment and filed a charge of discrimination with EEOC. On October 5, 1999, EEOC found reasonable cause to accept the truth of McGhee's allegations and referred her charge to DOJ.

Maria Gonzalez

In spring 1997, HRA assigned Maria Gonzalez to do clerical work in its Manhattan offices. Within a week, Gonzalez's supervisor, Gregory Payne, began touching her without her consent. Gonzalez thwarted Payne's attempt to grope her genital area by pushing him away, but he frequently touched and twirled her hair and blew on her neck. On several occasions, Payne observed that Gonzalez had worn a long skirt and told her that the skirt "made it easier for [him] to get at her." After Gonzalez rebuffed Payne's advances, he frequently called her a "lesbian," a "bitch,"

and "hideous" and said that "all [she] needed was a man." Payne also made it more difficult for Gonzalez to verify her hours by taking her time cards. When Gonzalez complained to Payne's supervisor, Robert Estelle, he told her that she would have to resolve the issue with Payne.

In January 1999, Payne grabbed Gonzalez and attempted to kiss her. During the next two months, Payne twice threatened to have her killed. In March 1999, Gonzalez complained to Robert Fox, another of Payne's supervisors. Fox told Gonzalez to put her complaint in writing and responded to the written complaint by transferring Gonzalez to another location where there was no work for her. HRA then transferred Gonzalez to a third location where working conditions were so poor that she left. Gonzalez filed an EEOC charge. EEOC found reasonable cause to support the charge and referred it to DOJ.

Theresa Caldwell-Benjamin

In July 1996, HRA assigned Theresa Caldwell-Benjamin, an African-American woman, to work for the City's Parks Department. Her tenure with the Parks Department was uneventful until March 1998 when she was assigned to paint the interior of a building on Staten Island. On the first day of her assignment, she observed a noose hanging in one of the windows of the building as well as a racist caricature of a black man and boy. Caldwell-Benjamin complained to her WEP supervisor, who told her that the other employees meant nothing by the noose and caricature. The noose remained in the window during the entire week that Caldwell-Benjamin worked there. Although the racist caricature was removed during the painting, it was replaced after the painting was completed. On October 4, 1999, EEOC found that Caldwell-Benjamin's subsequent

complaint was supported by reasonable cause and referred the charge to DOJ.

Norma Colon

On May 5, 1997, HRA assigned Norma Colon to work at its Office of Employment Services as a computer operator. During Colon's orientation, she noticed her supervisor, George Santiago, staring at her. After the orientation, Santiago invited Colon to lunch. Santiago also arranged for Colon's desk to be next to his. Santiago frequently and usually outside the presence of others told Colon that he had a nice car and wanted to take her to parties. On one occasion, Santiago said that Colon's stomach was bloated and asked if she was having her period. He also referred to the "big boobs" of women in a beauty contest he had judged. On the same occasion, Santiago told Colon that she could solve all her problems by spending the night with him at a motel. In apparent retaliation for Colon's lack of response, Santiago refused to help Colon to obtain necessary childcare and she was forced to leave her placement. Colon also filed an EEOC complaint. EEOC found reasonable cause to support her charges and issued a right to sue letter on June 28, 2001.

District Court Proceedings

In May 2001, the United States brought a lawsuit against the city and NYCHA pursuant to 42 U.S.C. § 2000e-5(f)(1), which allows the Attorney General to sue to redress charges of discrimination filed with the EEOC against states and municipalities. The United States acted on behalf of Gonzalez, Auer, Caldwell-Benjamin, and

McGhee.[1] All four women moved to intervene in the government's lawsuit, and Auer sought to add claims based on state and local anti-discrimination law. In September 2001, Colon filed a lawsuit asserting both federal and state discrimination claims on her own behalf.

Defendants moved to dismiss both lawsuits pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). In support of both motions, defendants argued that the individual plaintiffs were not employees within the meaning of Title VII and that, even assuming they would otherwise be considered employees, 42 U.S.C. §§ 608(d) and 617 evince an intent that Title VII not apply to WEP participants. The court consolidated the lawsuits for the purpose of hearing and deciding the motions.

Although defendants argued both lack of subject matter jurisdiction and failure to state a claim, the district court assumed that jurisdiction existed and resolved the motion under Federal Rule of Civil Procedure 12(b)(6). In an unpublished opinion and order dated March 8, 2002, Judge Richard Conway Casey granted defendants' motions, holding that defendants were not employees within the meaning of Title VII. After noting that we require a putative employee to demonstrate that she was "hired" before reviewing common law factors to determine whether the individual is an employee or an independent contractor, Judge Casey pointed out that the individual plaintiffs did not allege they were hired. Equating "hiring" with the receipt of "direct or indirect remuneration from the alleged employer," the judge found that plaintiffs did not receive "employment-related benefits from Defendants." The

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[1] On appeal, McGhee settled her claims against defendants. Because she is no longer a party to this appeal, we have not included her in the caption and the Clerk is directed to delete her name from the official caption.

factors supporting Judge Casey's conclusion were (1) Section 608(c)'s instruction that discontinuance of TANF benefits based on failure to comply with work requirements is not a reduction in wages; (2) his own assessment that "[e]very benefit [p]laintiffs received resulted from their status as welfare recipients;" (3) plaintiffs' non-receipt of benefits such as pensions, survivors benefits, sick pay, and health insurance that we and other courts have considered in determining whether an individual who does not receive wages is an employee; and (4) plaintiffs' potential entitlement to workers compensation benefits in amounts different from those received by other employees.

Although the EEOC previously had announced in an enforcement guideline that PRWORA participants could be employees under appropriate circumstances, Judge Casey found EEOC's position to conflict with Second Circuit cases and thus to be unpersuasive. He rejected similar positions by the Department of Labor and Department of Health and Human Services because these agencies are not charged with administering Title VII. Having found that the plaintiffs were not employees within the meaning of Title VII, Judge Casey had no need to determine whether Sections 608(d) and 617 of PRWORA are intended to exclude from Title VII protections persons performing work activities as a condition of TANF eligibility.

Defendants had not objected to the intervention of any of the individual plaintiffs except Auer, who attempted to make state and local law claims. Judge Casey denied Auer's motion to intervene as moot and also declined to exercise supplemental jurisdiction over Colon's state law claims.

Plaintiffs appealed, arguing that their complaints sufficiently alleged their status as Title VII employees to withstand a motion to dismiss and that PRWORA does not preempt Title VII. Colon also contends that the court erred by dismissing her state law claims. Two groups of amici consisting of civil rights and workers' rights organizations have submitted briefs in support of plaintiffs' position.

DISCUSSION

I. Standard

We review a Rule 12(b)(6) dismissal de novo, accepting all of the plaintiff's allegations as true and drawing all inferences in a manner favorable to the plaintiff. *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001). Complaints alleging civil rights violations must be construed especially liberally. *Id.*

II. Overview

To determine whether Title VII covers WEP participants, we look first to Title VII itself and to cases interpreting it. If the individual plaintiffs fall within Title VII's definition of an employee, we then must examine whether PRWORA is intended to preempt Title VII's coverage for WEP.[2]

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[2] Defendants claim they are not making a preemption argument, but arguing that the plain language of PRWORA demonstrates that Congress did not intend to extend Title VII coverage to TANF beneficiaries. This argument is, of course, a preemption argument. If Title VII covers WEP participants by its own terms, it is of no moment that PRWORA is silent on the issue. Thus, defendants can argue only that PRWORA evinces an intent to repeal coverage that would otherwise exist, which is a preemption argument.

III. Coverage Under Title VII

Title VII itself defines an employee as "an individual employed by an employer." 42 U.S.C. § 2000e(f). In applying this somewhat "circular" definition, we use a two-part test. *O'Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997). First, the plaintiff must show she was hired by the putative employer. *Id.* To prove that she was hired, she must establish that she received remuneration in some form for her work. *Id.* at 116. This remuneration need not be a salary, *Pietras v. Board of Fire Comm'rs of the Farmingville Fire Dist.*, 180 F.3d 468, 473 (2d Cir. 1999), but must consist of "substantial benefits not merely incidental to the activity performed," *York v. Association of the Bar of the City of New York*, 286 F.3d 122, 126 (2d Cir.), *cert. denied*, 123 S. Ct. 702 (2002). Once plaintiff furnishes proof that her putative employer remunerated her for services she performed, we look to "the thirteen factors articulated by the Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)" to determine whether an employment relationship exists. *Eisenberg v. Advance Relocation and Storage, Inc.*, 237 F.3d 111, 113-14 (2d Cir. 2000). These factors, which derive from the federal common law of agency, are

> the hiring party's right to control the manner and means by which the product is accomplished[;] the skill required; the sources of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the

> work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Reid, 490 U.S. at 751-52 (footnotes omitted). We place the greatest emphasis on "the extent to which the hiring party controls the manner and means by which the worker completes his or her assigned tasks." *Eisenberg*, 237 F.3d at 114 (internal quotation marks omitted).

Defendants tacitly concede, as they must, that plaintiffs' work was completely controlled by the various agencies for which they worked but argue that plaintiffs do not satisfy the first *O'Connor* prong, being "hired," because they received no remuneration for their work.

We disagree. The plaintiffs allege that they received cash payments and food stamps in return for their work for the city. Those payments equaled the minimum wage times the number of hours the plaintiffs worked. A plaintiff who unjustifiably refused to work would lose the portion of the family's grant attributable to her. Thus, each plaintiff had to work in order to receive her share of the family grant. A functional commonsense assessment of the plaintiffs' alleged relationship with the city results in the conclusion that they were employees.

In addition, plaintiffs received other benefits including transportation and child care expenses and eligibility for workers' compensation because of their work. Contrary to the district court's position, these benefits do not flow solely from their status as welfare recipients. The individual plaintiffs must perform useful work to receive any of the benefits. *See* N.Y. Soc. Serv. L. § 336-c(2)(b). Because

these benefits are substantial,[3] they satisfy the *O'Connor/Pietras/York* test.

In addition, the plaintiffs' position is consistent with that of the agency charged with interpreting Title VII, the EEOC, which has amended its compliance manual to state:

> A welfare recipient participating in work-related activities as a condition for receipt of benefits will likely be an "employee." The fact that an entity does not pay the worker a salary does not preclude the existence of an employer-employee

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[3] The dissent disparages the importance of workers' compensation to the WEP participant, characterizing it as "chiefly a benefit for the employer." Dissent at 7735. This argument ignores the history and purpose of workers' compensation statutes. The primary purpose of those laws was "to provide benefits to the victims of work-related injuries by allocating the burden of payments to the employer and therefore ultimately to consumers." 4 J.D. Lee & Barry A. Lindahl, *Modern Tort Law* § 43.10, at 43-20 (2d ed. 2002). The laws relieve the injured worker of the need to bring a tort action, to prove fault on the part of the employer, and to wait until the conclusion of a potentially lengthy court proceeding to obtain compensation. *Id.* "Given the limited hopes a worker might have under the common law rules, workers' compensation statutes represented progressive reform." 2 Dan B. Dobbs, *The Law of Torts* 1098 (2001). The dissent underplays the importance of the benefit to the worker by discussing only the medical coverage provided. Workers compensation also provides cash benefits, N.Y. Workers' Comp. L. § 14, and scheduled awards in the case of certain disabilities, *id.* § 15.

Of course workers' compensation schemes include benefits for employers as well. In particular, by extinguishing the tort action in exchange for the no-fault benefit, the schemes eliminate the potential for the ruinous verdicts that might otherwise be obtained by injured workers who have the wherewithal to bring a lawsuit and establish negligence. That employers obtain this benefit does not alter the fact that workers compensation is a significant benefit to the worker and particularly to the worker who may not be able to establish negligence.

> relationship. The determination of whether there is an employment relationship is based on the same factors outlined above [the *Reid* factors].

EEOC Notice No. 915.003 § 5.a (Dec. 3, 1997). The EEOC also instructs that

> welfare recipients would likely be considered employees in most of the work activities described in the new welfare law, including unsubsidized and subsidized public and private sector employment, work experience, and on-the-job training programs. On the other hand, individuals engaged in activities such as vocational education, job search assistance, and secondary school attendance would probably not be covered.

EEOC Notice No. 915.002 § 5.a (Dec. 3, 1997) (footnotes omitted). These interpretations, which are neither adjudications nor the result of notice and comment rulemaking, are "entitled to respect . . . only to the extent that [they] have the power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (internal quotation marks omitted). The district court found EEOC's opinion unpersuasive because it relied on the *Reid* factors and did not address this court's substantial economic benefit test. However, the EEOC's division of persons performing work activities into those presumably receiving some remuneration for services rendered to an agency (those participating in subsidized and unsubsidized public and private sector employment, work experience, and on-the-job training) and those neither rendering services nor receiving remuneration (students and participants receiving job search assistance) is reasonable and completely consistent with

the Second Circuit's employee test. Thus, it was entitled to respect.[4]

Despite our cases, the substantial work-related benefits plaintiffs received, and the EEOC's position, defendants contend that the individual plaintiffs are not employees. Relying primarily on a case from the Tenth Circuit, and one from the New York Court of Appeals, defendants argue that the benefits and income plaintiffs receive are part of a scheme of public assistance benefits rather than remuneration for work performed. The dissent also suggests that *O'Connor* precludes employee status for plaintiffs. Finally, both the dissent and the defendants claim that 42 U.S.C. § 608(c) requires a finding that plaintiffs are not employees. In the succeeding paragraphs, we explain why defendants'—and the dissent's—reliance on these cases and on Section 608(c) is misplaced.

In *Johns v. Stewart*, 57 F.3d 1544 (10th Cir. 1995), the court found that participants in a Utah public assistance program that antedated PRWORA and required recipients' "participation in a broad range of adult education, short-term skills training, community work and job search activities" were not employees within the meaning of the Fair Labor Standards Act ("FLSA"). 57 F.3d at 1550, 1559. The Tenth Circuit rejected employee status because the work component was "just one requirement of . . . comprehensive assistance programs" with many other components. *Id.* at 1558. It noted that recipients applied for public assistance, and not for a job, that taxes were not withheld from their grants, and "that they do not receive

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[4] We note that the Supreme Court recently placed significant weight on another portion of the EEOC Compliance Manual in addressing the Americans with Disabilities Act's definition of employee. *Clackamas Gastroenterology Assocs. v. Wells*, 123 S. Ct. 1673, 1679-81 (2003).

the same salary, safe working conditions, job security, career development, Social Security, pension rights, collective bargaining, or grievance procedures as do the actual employees." *Id.* at 1559 (internal quotation marks omitted).

For several reasons, *Johns* does not persuade us that WEP participants cannot be considered Title VII employees. First, *Johns* is not a Title VII case and the workfare program was not governed by PRWORA. Therefore, the *Johns* court did not use the *O'Connor* analysis or consider the administrative interpretations relevant to Title VII or to PRWORA. Second, as we discuss below, even with respect to the statute *Johns* does construe, the FLSA, the Department of Labor ("DOL"), the agency charged with interpreting the FLSA, has rejected the *Johns* approach. Third, there is no indication in *Johns* that the participants received the full range of benefits received by WEP participants or that they were required to perform useful work. Finally, the *Johns* analysis and most of defendants' arguments rest on an artificial dichotomy: one must be either a welfare recipient or an employee and cannot be both. *Johns*, 57 F.3d at 1558. For instance, defendants argue that the Human Resources Administration could have terminated or reduced plaintiffs' grants for any one of a number of reasons, not just for their failure to accept an assignment to WEP. They also point out that a parent's failure to work does not result in the termination of the entire family's public assistance grant and that the benefits the participant receives are calculated on the basis of her family's need and not based on the amount or the type of work she performs. The answer to defendants' arguments and to *Johns* is that we have not adopted an either/or approach to employee status. Instead, we recognize that a person may be an employee with respect to certain of his

duties and not be an employee with respect to others. *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1539-40 (2d Cir. 1996) (holding that corporate directors who also served as officers and/or employees of the corporation could be outside the scope of Title VII in their capacity as directors but protected by Title VII as officers and employees); *see also Baker v. McNeil Island Corr. Center*, 859 F.2d 124, 128-29 (9th Cir. 1988) (reversing Rule 12(b)(6) dismissal of prison inmate's Title VII claim related to his application for a library-aide job that paid $30 per month and offered some training).

Defendants also rely on *Brukhmam v. Giuliani*, 705 N.Y.S.2d 558 (N.Y. 2000), in which the New York Court of Appeals found that WEP participants are not employees within the meaning of a New York constitutional provision requiring contractors and subcontractors performing public work to pay their employees the prevailing wage for their work. 705 N.Y.S.2d at 561. *Brukhmam* addressed New York State Constitution article I, § 17, "which extends prevailing wage protection only to employees of contractors and subcontractors performing public work." 705 N.Y.S.2d at 561 (internal quotation marks omitted). In addition to finding that the plaintiffs were not employees "within the intendment of the New York Constitution," the Court also found that the plaintiffs did not perform public works and did not work for contractors or subcontractors. *Id.* at 562-63. Thus, whether or not WEP participants are employees, they would not be covered by Article I § 17 because they do not work for contractors or subcontractors within the meaning of Article I and are not engaged in "public works."

It is the difference in purpose between the New York constitutional provision and Title VII that best distin-

guishes *Brukhmam* from this case. Article I § 17 of the New York Constitution grants special economic rights to certain classes of workers, i.e, they must receive the prevailing wage in the community for the work they perform if the employer receives a public works contract. Title VII in contrast accords the basic civil right of freedom from discrimination to all employees employed by covered employers. In light of the very different scope of Section 17 and Title VII, it would be foolhardy to assume that the New York Court of Appeals would extend its interpretation of the prevailing wage provision to Title VII. In addition, *Brukhman* does not employ our long-established test for an employer-employee relationship and does not take into account the views of the agencies charged with enforcing Title VII and PRWORA.

The dissent cites *O'Connor* for the proposition that "although compensation by the *putative employer* in exchange for his service is not a sufficient condition, . . . it is an essential condition to the existence of an employer-employee relationship." Dissent at 7728-29 (quoting *O'Connor*, 126 F.3d at 116; internal quotation marks omitted; emphases added). O'Connor a college student, performed field work at a psychiatric hospital and received federal work study funding from the college she attended. She sued not the college but rather the psychiatric hospital, the state that operated the hospital, and her supervisor, who allegedly had sexually harassed her. In holding that O'Connor could not sue under Title VII or Title IX, we pointed out that the psychiatric hospital had "no affiliation to" the college that, using federal funds, paid O'Connor. *Id.* at 119. Simply put, the putative employer paid nothing to the putative employee. In contrast, the City is both the payor and the recipient of the plaintiffs' services in this case. Thus, the rationale of *O'Connor* does not apply.

Defendants also argue that unlike the benefits we previously have considered significant in the Title VII context such as sick and medical leave, pensions, and health insurance, the benefits plaintiffs received—a cash grant, transportation and child care expenses, and eligibility for workers' compensation—are not typically associated with employment. Workers' compensation, of course, is typically associated with employment, and the fact that WEP participants *may* receive only a partial benefit, N.Y. Soc. Serv. L. § 336-c(2)(c), is not dispositive in light of this circuit's definition of an employee. Payment of money is also typically associated with employment. Moreover, the number of hours a recipient can be required to work is based on the size of her grant divided by the minimum wage, N.Y. Soc. Serv. L. § 336-c(2)(b), an all too typical way of calculating compensation for work. Finally, reimbursement for child care and transportation expenses may not be typical compensation for employment, but they are payments that are necessary only because the recipient works. They are not offered solely or primarily for the employer's benefit.

Finally, defendants rely on 42 U.S.C. § 608(c), which provides that a penalty imposed against a person "by reason of the failure of the individual to comply with a requirement under the State program funded under this part shall not be construed to be a reduction in any wage paid to the individual." 42 U.S.C. § 608(c). This provision is the linchpin of the dissent, which reads Section 608(c) as an "unambiguous command" from Congress that WEP participants' benefits must not be considered wages. Dissent at 7731; *see also id.* at 7725 ("The welfare benefits received by WEP participants are not wages because [PRWORA] says they are not . . . .").

This argument cannot be squared with the text of Section 608(c). Congress could easily have said that the benefits at issue in this case may not be considered wages, but it did not. Rather it said that the *withholding* of benefits (to penalize workers) may not be considered a reduction in wages. If the benefits were not considered wages (or the equivalent of wages) to begin with, Section 608(c) would be superfluous.

Logically, the fact that a penalty imposed on an individual WEP participant may not be considered a reduction in wages does not imply that the individual does not receive wages in the first instance. Plaintiffs in these cases must work in exchange for payments equal to the minimum wage times the number of hours they work. A failure to show up for work without good cause will produce (in the first instance) a pro rata reduction of those payments until the plaintiff returns to work. N.Y. Soc. Serv. L. § 342(2)(a). At that time, the payments resume, again at the rate of the minimum wage. Thus, the sanction is the loss of payments, not a wage reduction. An absent employee does not suffer a wage reduction simply because her pay is docked.

In short, Section 608(c) does not say that plaintiffs' benefits are not wages, and indeed the provision only makes sense if the opposite is true. Moreover, Section 608(c) eliminates a contradiction that otherwise would exist between the penalty provisions for recalcitrant workers and the requirement that welfare recipients who are forced to work not be paid below the minimum wage. *See id.* § 336-c(2)(b). For example, a WEP participant's second unexcused failure to appear at work results in a three-month loss of payments for the participant if the participant is the parent of a dependent child. *See id.* § 342(2)(b). Thus, even if the worker missed only one

month of work, and is willing to resume working immediately, her payments are docked for three months. In that event, the "benefits" divided by the hours worked produces a wage far below the minimum wage, and thus a possible violation of New York Social Services Law Section 336-c(2)(b). Section 608(c) allows the state to impose the penalty without violating the minimum wage requirement.

Even if Section 608(c) were—implausibly—read as a decree that the payments to these plaintiffs could not be considered wages, we would still find plaintiffs to be employees. We have held that a person need not receive wages in order to be considered an employee under Title VII. *Pietras v. Board of Fire Comm'rs*, 180 F.3d 468, 473 (2d Cir. 1999). Moreover, the applicability of Title VII turns on the substance of the relationship between plaintiffs and defendants, not on labels affixed by statutes.

We conclude that the relationship alleged here—which includes the cash payment, the related benefits, and the requirement that the plaintiffs' work be useful—if proved, establishes the plaintiffs as employees for the purposes of Title VII.[5]

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[5] The dissent argues that our reading of the statute is "unnecessary" because it "offers no incremental protection from sex discrimination." Dissent at 7726. If that is true—that is, if WEP participants are no better off with Title VII protection than without it—it is difficult to understand why, as the dissent further argues, the "chief impact" of our decision will be to impair "the flexible and temporary nature of WEP assignments." Dissent at 7726. It is equally difficult to understand how depriving WEP participants of a Title VII remedy for sexual harassment in the workplace would foster flexibility in welfare reform, or why that sort of flexibility would be a positive thing.

In fact, it is not true that Title VII "offers no incremental protection from sex discrimination." Section 603(a)(5)(I)(iv) of Title 42, on which the dissent relies, protects only participants in the Welfare to

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IV. Preemption

Having determined that the allegations of the complaint sufficiently establish the individual plaintiffs' status as Title VII employees, we turn to the question of whether Congress in enacting PRWORA intended to take away Title VII protections from WEP participants. In order for one federal statute to preempt or implicitly repeal another, there must be "express manifestations of a preemptive intent." *United States v. General Dynamics Corp.*, 19 F.3d 770, 774 (2d Cir. 1994). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Defendants find a clearly expressed congressional intention to remove WEP participants from the protection of Title VII in (1) Sections 608(d) and 617 of PRWORA; (2) the presence of a global non-discrimination provision in the legislation governing TANF's predecessor, AFDC; and (3) Congress's adoption, after it enacted PRWORA, of an amendment forbidding gender discrimination in a related program and referring enforcement to state agencies.

Section 608(d) provides that four specific discrimination laws apply to "any program or activity which receives funds provided under [PRWORA]": the Age Discrimina-

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TANF recipients who may be WEP participants but do not receive WtW services. *See id.* In addition, the grievance procedure provided for in Section 603(a)(5)(I)(iv) makes no provision for judicial review, an important aspect of Title VII. New York Social Services Law § 331(3), also cited by the dissent, simply prohibits discrimination and provides no remedy for the aggrieved WEP participant.

tion Act of 1975, Section 504 of the Rehabilitation Act, the American with Disabilities Act, and Title VI of the Civil Rights Act. Each of these laws contains provisions that forbid discrimination in programs or activities receiving federal assistance. *See* 42 U.S.C. § 6101, 29 U.S.C. § 794, 42 U.S.C. § 12132, 42 U.S.C. § 2000d.

Defendants rely on the maxim,"expressio unius est exclusio alterius," to argue that Congress's list of statutes governing programs that receive federal financial assistance means its failure to list statutes governing discrimination in employment is significant. We disagree. First, "[s]ince not every silence is pregnant, *expressio unius* is an uncertain guide to interpretation." *Westnau Land Corp. v. United States Small Business Admin*, 1 F.3d 112, 116 (2d Cir. 1993) (internal quotation marks omitted). Second, the maxim applies only when the statute identifies "a series of two or more terms or things that should be understood to go hand in hand," thus raising the inference that a similar unlisted term was deliberately excluded. *Chevron U.S.A., Inc., v. Echazabal*, 536 U.S. 73, 81 (2002). Section 608(d) includes non-discrimination laws applicable to programs or activities that receive PRWORA funds. These programs and activities include functions like education and vocational training that, due to the absence of an employment relationship, clearly are not subject to Title VII. Title VII, on the other hand, governs employment relationships whether federally funded or not. Therefore, Congress's failure to list Title VII with the "programs or activities" discrimination provisions is not a clear indication of Congressional intent to exclude from the protection of Title VII those PRWORA participants who under Title VII would be employees.

Defendants also rely on Section 617, which as previously noted, provides that "[n]o officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part." Based on this provision, defendants argue that Section 608(d) contains the only anti-discrimination provisions that the federal government can enforce.

Of course any preemptive effect that Section 617 might have would limit only the government's enforcement powers. Individual WEP participants would remain free to sue under Title VII or any other applicable statute. More significantly, Section 617 applies only to the provisions of PRWORA, and Title VII is not part of PRWORA. Therefore, Section 617 does nothing to restrict DOJ's enforcement of Title VII on behalf of WEP participants.

Next, defendants find significance in the inclusion in the former AFDC/JOBS program of a requirement that state agencies ensure that "[i]n assigning participants . . . to any program activity . . . individuals are not discriminated against on the basis of . . . sex . . . and all participants will have such rights as are available under any applicable Federal . . . law prohibiting discrimination." H.R. Rep. No. 104-651, at 908. They argue that Congress's failure to include similar language in PRWORA evinces Congressional intent to remove those protections. Because the AFDC/JOBS program was repealed in its entirety, no particular significance attaches to the revocation of this provision. In fact, Congress also repealed a provision stating that AFDC payments to workfare participants were not "compensation for work performed." *Id.* at 904. Since this provision suggests that AFDC workfare participants were not employees within the meaning of Title VII, the

repeal of the AFDC/JOBS program can just as logically—or illogically—be seen as a manifestation of Congressional intent that WEP participants be covered by Title VII as of Congressional intent to the contrary.

Finally, defendants discern a Congressional intent that Title VII not apply to PRWORA participants in a 1997 amendment to PRWORA authorizing Welfare-to-Work ("WtW") grants, 42 U.S.C. § 603(a)(5). The parties agree that some TANF recipients are eligible for WtW services but that persons other than TANF recipients also will be eligible. The WtW legislation contains a non-discrimination provision which states:

> (iii) Nondiscrimination. In addition to the protections provided under the provisions of law specified in section 608(c) [*sic*, probably 608(d) intended] of this title, an individual may not be discriminated against by reason of gender with respect to participation in work activities engaged in under a program operated with funds provided under this paragraph.

42 U.S.C. § 603(a)(5)(I)(iii). WtW also provides a state grievance procedure as the exclusive remedy for gender discrimination complaints. 42 U.S.C. § 603(a)(5)(I)(iv). Like PRWORA, WtW includes both activities that would normally be considered employment and activities that would not traditionally be considered employment. *See* 42 U.S.C. § 603(a)(5)(C). The non-discrimination provision in WtW would therefore serve a useful purpose even if Title VII were available to protect employees. Section 608(d)—through its adoption of various other non-discrimination statutes—provides protection against age, disability, race, and national origin discrimination in programs and activities receiving federal financial assistance.

Subsection iii of Section 603(a)(5)(I) adds gender discrimination to that list for all activities funded by WtW. Other anti-discrimination statutes like Title VII prohibit the same categories of discrimination for PRWORA participants who also are employees. Thus, WtW's gender discrimination provision is no stronger a basis for finding preemption than is Section 608(d), which we already have held does not demonstrate preemptive intent.

In fact, the legislative history of the WtW program strongly suggests that Congress intended no preemption. Before Congress authorized the WtW program, DOL issued a guidance indicating that anti-discrimination laws "apply to welfare recipients as they apply to other workers. The new welfare law does not exempt welfare recipients from these laws." United States Department of Labor, How Workplace Laws Apply to Welfare Recipients, at Q&A No. 1 (May 1997, revised Feb. 1999). The omnibus budget bill reported to the House on June 24, 1997, contained a provision specifically designed to override the guidance:

> A recipient of assistance under a State program funded under this part who is engaged in work experience or community service with a public agency or nonprofit organization shall not be considered an employee of the public agency or the nonprofit organization.

H.R. Rep. No. 105-149, at 238, 293. The House later modified this language to provide: "Participants engaged in work experience and community service programs are not entitled to a salary or work or training expenses and are not entitled to any other compensation for work performed." H.R. Rep. No. 105-217, at 934. Neither measure was adopted by Congress and neither became part of the Balanced Budget Act that President Clinton signed into

law on August 5, 1997. The Conference Committee report on the bill acknowledged that DOL had determined that "workfare participants may be covered 'employees' and thus would be covered by the Fair Labor Standards Act (FLSA), which sets hour and wage standards, and other employment laws" and noted that the Committee had rejected the House's effort to override DOL's interpretation. *Id.* The failure of Congress to act when it had knowledge of DOL's interpretation suggests that DOL's interpretation is correct.

Regulations issued by the two agencies charged with enforcing PROWRA, DOL and the Department of Health and Human Services ("HHS") also support finding no preemption. The current DOL regulation on discrimination incorporates all the protections of Section 608(d), *see* 20 C.F.R. § 645.255(a) as well as the gender protections of the WtW program, *see id.*, subd. (b). The regulation also states:

> Complaints alleging discrimination in violation of any applicable Federal, State or local law, such as Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), the Pregnancy Discrimination Act (42 U.S.C. 2000e (paragraph k)), or Section 188 of the Workforce Investment Act of 1998 (29 U.S.C. 2938) as well as those listed in paragraph (a) of this section, shall be processed in accordance with those laws and the implementing regulations.

20 C.F.R. § 645.255(c). HHS has issued a regulation explicitly stating that Section 617 does not have a preemptive effect on Title VII. It provides:

> The limitation on Federal regulatory and enforcement authority at section 417 of the Act does not limit the effect of other Federal laws, including Federal employment laws (such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA) and unemployment insurance (UI), and nondiscrimination laws. These laws apply to TANF beneficiaries in the same manner as they apply to other workers.

45 C.F.R. § 260.35(b). The district court found these regulations unpersuasive because Title VII is not within either agency's delegated authority. Defendants argue that the regulations deserve no deference because both agencies changed their positions on the issue as the result of public advocacy.

Legislative regulations issued after notice and comment rulemaking, as these regulations were, are given "considerable weight." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). However, no deference is required where the agency acts outside its delegated authority. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990). The district court found that because HHS and DOL have no authority to define Title VII's coverage, their regulations are not binding. We disagree. DOL and HHS do not purport to define the coverage of Title VII. Instead, their regulations set forth, respectively, the manner in which discrimination claims are to be processed and the lack of preemptive effect attributable to Section 617, both subjects that are well within the respective agency's authority. *See* 42 U.S.C. §§ 602 (granting Secretary of Health and Human Services authority to approve state TANF plans) and 603(a)(5)(C)(ix) (directing Secretary of Labor, after consultation with Secretary of Health

and Human Services to promulgate regulations implementing WtW).

Defendants also argue that the DOL and HHS regulations are not entitled to respect because both agencies shifted their positions on the applicability of Title VII to PRWORA participants. The case on which defendants rely, *EEOC v. Arabian Oil Co.*, 499 U.S. 244, 257 (1991), lists a variety of factors, including consistency over a period of time, that should be used to determine how much weight to give an EEOC guideline. Because *Arabian Oil* does not address regulations, it is not particularly helpful in this case.

More important, the agencies did not shift position. It is true that DOL did not mention Title VII in the interim final version of Section 645.525. 62 Fed. Reg. 61588, 61608 (Nov. 18, 1997). However, in the preamble to this interim regulation, DOL said: "The Balanced Budget Act of 1997 amended the PRWORA. It provides for, among other things, a new civil rights protection against gender discrimination. This provision ensures that participants who may not be covered under either Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972, are protected against gender discrimination." *Id.* at 61597. Because certain TANF recipients will be neither employees nor students, this comment is entirely consistent with DOL's prior position, as expressed in its guideline, that anti-discrimination laws such as Title VII apply to welfare participants as they do to other workers and with its final regulation, which explains how discrimination complaints of various sorts should be processed. The statement indicates only that some WtW participants may not be employees and thus may not be covered by Title VII.

In the preamble to its final regulations, HHS acknowledged that it had not initially included Title VII or the anti-discrimination provisions in Section 608(d) in its regulation. 64 Fed. Reg. 17720, 17747 (Apr. 12, 1999). The agency noted that its omission had provoked several negative comments and determined

> that [the language in the earlier regulation] did not adequately represent this Administration's commitment to the enforcement of civil rights and labor laws. In that context, we have decided that we should focus more attention on these protections in the final rule. We can do that without violating section 417 [42 U.S.C. § 617] (in letter or spirit) or interfering with the jurisdiction of other Federal agencies. In light of the concerns raised in these comments, we believed it would be helpful to include the nondiscrimination provisions referenced at section 404(d) of the Act in the regulation. They appear at § 260.35(a). In § 260.35(b), you will find new regulatory language designed to further clarify the protections applicable to TANF programs and activities. In this new clarifying language, we make the point that section 417 of the Act does not limit the effect of other Federal laws, including those that provide workplace and non-discrimination protections. We also indicate that Federal employment laws and nondiscrimination laws apply to TANF beneficiaries in the same manner as they apply to other workers.
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> Based on comments we received in this subject area and on some of the fiscal issues being raised, we were concerned that some States were reading

> the limitations in section 417 more broadly, in effect to free States from all provisions of Federal law, except those in the new title IV-A. In fact, section 417 only limits regulation and enforcement of the TANF provisions. It does not affect the applicability of other Federal laws or the authority of other Federal agencies to enforce laws over which they have jurisdiction.

Id. Read in context, it is clear that HHS did not reverse position on the applicability of Title VII. Rather, it initially declined to reference Title VII in its regulations because it is not charged with enforcing Title VII. After receiving comments both from welfare recipient advocates distressed at the omission and from state officials who believed no federal law except PRWORA had any impact on their administration of PRWORA, HHS changed the regulation only to clarify that PRWORA did not preempt Title VII's protection of employees who also receive TANF funds.

In sum, neither the language of Sections 608(d) and 617 nor the legislative history of PRWORA supports a conclusion that Congress intended to preempt Title VII's protections. In addition, both administrative agencies with a role in administering PRWORA have issued regulations suggesting that no preemption exists. Because the allegations in the complaint sufficiently establish the individual plaintiffs' status as employees within the meaning of Title VII and we discern no preemptive intent in PRWORA, we reverse the district court's dismissal of plaintiffs' Title VII claims.

V. State and local law claims

Colon argues that if we vacate dismissal of her federal claims, we also should reinstate her related state and local claims. The district court declined to exercise supplemental jurisdiction over state and local claims solely because it had dismissed all claims over which it had original jurisdiction. Because we vacate the dismissal of plaintiffs' federal claims, we also vacate the dismissal of plaintiffs' state and local claims without reaching the merits of those claims and without prejudice to the district court's consideration of other bases for dismissal.

CONCLUSION

We hold that the allegations of plaintiffs' complaints sufficiently pleaded the individual plaintiffs' status as employees entitled to Title VII's protection and that PRWORA does not preempt Title VII with respect to WEP participants. Because the district court dismissed state and local claims solely for lack of supplemental jurisdiction, these dismissals also must be vacated. We remand for further proceedings consistent with this opinion.

DENNIS JACOBS, *Circuit Judge*, dissenting:

I respectfully dissent.

Participants in New York City's Work Experience Program ("WEP") are not covered by Title VII because they are not "employees" of the City of New York. Under the settled principles set out in this opinion: (1) a person is not an employee unless she is "hired" by an employer (and is not an independent contractor); (2) a person is hired only

if she receives direct or indirect remuneration for services rendered; (3) the remuneration must be substantial; and (4) remuneration includes wages and benefits but excludes benefits that are incidental to the work.

The welfare benefits received by WEP participants are not wages because the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") says they are not: "A penalty imposed by a State against the family of an individual by reason of the failure of the individual to comply with a requirement under the State program funded under [PRWORA] shall not be construed to be a reduction in any wage paid to the individual." 42 U.S.C. § 608(c). And the several other small accommodations afforded to participants are incidental to their WEP assignments. Thus carfare and child care reimbursements merely facilitate the recipient's appearance at work and forestall excuses for nonappearance; and workers' compensation advantages the City by limiting its liability for accidents at a workfare site. As the majority notes, these supposed benefits "are necessary only because the [welfare] recipient works." Maj. Op. at 7711. As our case law demonstrates, however, things that are needed only because someone does work (such as the provision of a desk or a parking space) do not count in assessing whether a person is receiving "substantial benefits" amounting to remuneration.

Thus, an intern at a psychiatric hospital who receives a federal work study grant is not an employee, *O'Connor v. Davis*, 126 F.3d 112, 115-16 (2d Cir. 1997); nor is a lawyer volunteering her services to a bar association. *York v. Assoc. of the Bar*, 286 F.3d 122, 125-126 (2d Cir. 2002). For the same reasons, a WEP participant assigned to the City for work experience is not a City employee.

The majority's conferral of employee status on WEP participants offers no incremental protection from sex discrimination. That protection is already secured by state law. Congress directed the states to establish remedies for discrimination claims arising out of programs funded under the PRWORA, 42 U.S.C. § 603(a)(5)(I)(iv). In particular, New York State law prohibits the discrimination that is alleged by these plaintiffs. *See* N.Y. Soc. Serv. Law § 331(3) (prohibiting "discrimination on the basis of race, color, national origin, sex, religion or handicap, in the selection of [WEP] participants, their assignment or reassignment to work activities and duties, and the separate use of facilities or other treatment of [WEP] participants"). The holding of the majority opinion is therefore unnecessary to protect the plaintiffs; for the same reason, the section of the majority opinion that recounts "in some detail" the repellent facts of the discrimination alleged by each individual is gratuitous. *See* Maj. Op. at 7695-7699.

Since the protection against sexual discrimination afforded by the majority opinion is redundant, the only likely impact of this case will be to frustrate important welfare reforms by impairing the flexible and temporary nature of WEP assignments. PRWORA was designed, *inter alia*, to assist state programs that allow welfare recipients to move from dependency to gainful employment via training and workplace experience. 42 U.S.C. § 601(a)(2). If WEP participants are "employees" under federal common law, it may then follow—and it will certainly be argued—that they have a right, like other employees, to unionize, *see* 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . ."), a development incompatible with the statutory goal of a transitional work

experience. And there are no doubt other implications under state law of turning thousands of WEP participants into City employees. *Cf. Brukhman v. Giuliani*, 94 N.Y.2d 387, 705 N.Y.S.2d 558 (2000) (discussing, *inter alia*, employee status under the New York State Constitution).

The only other circuit court to consider the question, discussed *infra* Section IV.C, has rejected the idea that workfare participants are employees. *See Johns v. Stewart*, 57 F.3d 1544, 1557-59 (10th Cir. 1995) (holding that workfare participants are not employees under the Fair Labor Standards Act).

I

Title VII defines an "employee" as "an individual employed by an employer," 42 U.S.C. § 2000e(f), a definition that we have called "unhelpful[ ]," *Pietras v. Bd. of Fire Comm'rs*, 180 F.3d 468, 473 (2d Cir. 1999), and "circular," *O'Connor*, 126 F.3d at 115. "Courts have assumed, however, that in using the term employee Congress had in mind 'the conventional master-servant relationship as understood by common-law agency doctrine.'" *Pietras*, 180 F.3d at 473 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992)). In ascertaining whether WEP participants are "employees" for purposes of Title VII, we therefore look to "the cluster of ideas" attached to that term under the common law. *See INS v. St. Cyr*, 533 U.S. 289, 312 n.35 (2001) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

Much of the common law on this subject differentiates employees from independent contractors, *see, e.g.*, *O'Connor*, 126 F.3d at 115, a distinction that is irrelevant here. This Court has pointed out, however, that independ-

ent contractors and employees share an essential feature: both are "hired parties." *Id.* (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989)). "[T]hus, a prerequisite to considering whether an individual is one or the other under common-law agency principles is that the individual have been hired in the first instance. That is, only where a 'hire' has occurred should the common-law agency analysis be undertaken." *Id.*; *see Reid*, 490 U.S. at 743 ("[I]n using the term 'employee,' . . . Congress meant to refer to *a hired party* in a conventional employment relationship.") (emphasis added); *cf. Clackamas Gastroenterology Assocs. v. Wells*, 123 S. Ct. 1673, 1680 (2003) (stating that "[t]he employer can hire and fire employees").

In *O'Connor*, we articulated the requirement that a Title VII plaintiff be "hired in the first instance." *O'Connor*, 126 F.3d at 115. In that case, a college student sued a hospital in which she had been working as an intern, alleging sexual harassment in violation of Title VII. *Id.* at 113. In rejecting the intern's Title VII claim, we held that she had never been hired as a hospital employee because she was owed no "direct or indirect economic remuneration" amounting to "compensation" for her work. *Id.* at 116. We specifically relied on the fact that the plaintiff received "no salary or other wages, and no employee benefits such as health insurance, vacation, or sick pay, nor was she promised any such compensation." *Id.* We explicitly rejected the arguments [i] that receipt of federal work study funding (based on the number of hours she worked at the hospital) was sufficient to make her a hospital employee and [ii] that such a governmental benefit could be considered compensation. *Id.* at 116 n.2. In dismissing the Title VII claims, we explained that "although 'compensation by the putative employer to the putative employee in exchange for his

services is not a sufficient condition, . . . it is an essential condition to the existence of an employer-employee relationship.' " *Id.* at 116 (quoting *Graves v. Women's Prof'l Rodeo Assoc.*, 907 F.2d 71, 73 (8th Cir. 1990)).

The majority opinion attempts to distinguish *O'Connor* on the ground that here "the City is both the payor and the recipient of the plaintiffs' services." Maj. Op. at 7710. Casting the City as "payor" glides over the dispositive question: just what is being *paid*? As *O'Connor* holds, unless the payee is being paid *compensation*, the payee is not an employee. As the New York Court of Appeals has held, the "agencies and entities" to which WEP participants are assigned "simply do not pay a salary to the Program participants." *Brukhman*, 94 N.Y.2d at 396; 705 N.Y.S.2d at 563 (internal citation omitted).

The majority attempts to distinguish *Brukhman* on the ground that it would be "foolhardy to assume that the New York Court of Appeals would extend its interpretation of the prevailing wage provision [of the New York Constitution] to Title VII."[1] Maj. Op. at 7710. However, Judge Bellacosa's opinion is categorical on this point, and the court's holding rests on principles applicable to employment status generally:

> [WEP] participants simply are not "in the employ of" anyone—that is the very reason they are receiving welfare benefits and required to participate in the Program, until they can find or be placed in jobs with the customary array of traditional indicia of employment. The Program's

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[1] Presumably, the majority opinion is likewise limited (to Title VII), and "it would be foolhardy to assume" that it may be read to extend in other directions for other uses.

> policy and procedures manual directs that "participants are expected to seek paid employment." Participants are "assigned" (Social Services Law § 336-a) to various "work site[s]" (Social Services Law § 336-c), where they provide "valuable service" until they are able "to secure employment in the regular economy" (*see*, [WEP] Program Manual). While the agencies providing work assignment opportunities obviously employ some people, they are not "employing" Program participants (*see*, *Social Investigator Eligibles Assn. v Taylor*, [268 N.Y. 233, 236-237 (1935)] [work relief participants are not subject to the Civil Service Law]). These agencies and entities simply do not pay a salary to the Program participants—one of the fundamental requisites that sparks the prevailing wage entitlement [in the New York State Constitution].

Brukhman, 94 N.Y.2d at 393, 395-96; 705 N.Y.S.2d at 561, 563. The *Brukhman* analysis is of course wholly consistent with PRWORA's goal of promoting employment. *See* 42 U.S.C. § 601(a)(2).

In any event, the outcome of this appeal should not hinge on whether a City agency is the "payor" of funds that come from the federal government and the State of New York and that are earmarked by them for the purpose of paying WEP participants—a hypertechnicality if there ever was one.[2]

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[2] If designation of the "payor" is deemed critical, then (assuming that principle is conscientiously applied in the future) the various government agencies that conduct the WEP program could obviate the holding in this case by tinkering with who cuts the checks to welfare recipients.

II.

Although "an employment relationship within the scope of Title VII can exist even when the putative employee receives no salary," *see Pietras*, 180 F.3d at 473, the usual compensation for work is wages. The majority emphasizes that the welfare benefits received by WEP participants equal the hours they work multiplied by the minimum wage, "an all too typical way of calculating compensation for work." Maj. Op. at 7711. But the inference—that Temporary Assistance to Needy Families ("TANF") is wages—is unavailable; in *O'Connor*, we held that work study funding did not support an inference of employment even though the funding was calculated on the basis of the number of hours worked. 126 F.3d at 112 n.2. The inference on which the majority relies is also blocked by statute:

> A penalty imposed by a State against the family of an individual by reason of the failure of the individual to comply with a requirement under the State program funded under this part *shall not be construed to be a reduction in any wage paid to the individual.*

42 U.S.C. § 608(c) (emphasis added).

The majority explains away this unambiguous command by saying that it "only makes sense" if welfare benefits are wages, maj. op. at 7712, *i.e.*, that reduction in benefits could not be construed or misconstrued as a reduction in "any wage" unless it is a wage to begin with, and that "Congress could easily have said that the benefits at issue may not be considered wages," *id.* The holding of the majority opinion is thus the offspring of a negative pregnant. Moreover, the inference drawn by the majority is

defective. Section 608(c) refers to "any wage" (which may account for receipt of payments in excess of the welfare benefits by some WEP participants in private sector assignments), and Congress could easily have said "*the* wage" instead of "*any* wage" if (as the majority argues) the WEP benefits constitute wages. The majority has simply rejected the most natural and direct reading of the text; no wording can be framed by Congress to withstand an aggressive misreading.

I subscribe to the conclusion in *Brukhman*: "These agencies and entities simply do not pay a salary to the [Work Experience] Program participants . . . ." 94 N.Y.2d at 396; 705 N.Y.S.2d at 563.

Alternatively, the majority asserts that (even if TANF benefits are not wages) the carfare, child care and workers' compensation incidental to WEP participation suffice alone to constitute remuneration. *See* Maj. Op. at 7704-05. This idea is refuted in the following two sections.

III.

Our employment cases recognize that unpaid workers may nevertheless receive enough "direct or indirect economic remuneration" to be "hired" if certain of their benefits—those that are not merely incidental to the work—taken together, reach a sufficiently high level. *See, e.g.*, *York*, 286 F.3d at 125-26; *Pietras*, 180 F.3d at 473.

In *York*, we dismissed a suit in which a lawyer working on committees of the Association of the Bar of the City of New York sued the Association under Title VII alleging sexual harassment. *York*, 286 F.3d at 123-124. We held that "in order to satisfy this Circuit's remuneration test," the plaintiff must show that the benefits received were (1)

"sufficiently substantial" and (2) "not merely incidental to the activity performed." *Id.* at 126. York received the following benefits: (i) workspace, (ii) clerical support, (iii) publicity, (iv) tax deductions for nonreimbursable expenses, (v) networking opportunities, and (vi) reimbursement for out-of-pocket expenses. *Id.* at 124. We held that these things were both insubstantial and incidental as contrasted with "salary, vacation, sick pay, or benefits such as health insurance, disability insurance, life insurance, death benefits, and retirement pension, all of which primarily benefit the employee independently of the employer." *Id.* at 126.

In *Pietras*, a volunteer firefighter sued her department under Title VII, prevailing after a bench trial. On appeal, the fire department argued (for the first time) that she was not an employee under Title VII.[3] The "significant benefits" she cited "included: (1) a retirement pension, (2) life insurance, (3) death benefits, (4) disability insurance, and (5) some medical benefits." *Id.* at 471, 473. Those benefits are of course among the ordinary, bargained-for emoluments of employment; the health and death benefits do not appear to have been limited to injury or death on the job; and all of these things "primarily benefit the employee independently of the employer." *York*, 286 F.3d at 126. Even so, we held only that the firefighter's status as a "hired person" was a "fact question [because she was] entitled to *significant* benefits." *Pietras*, 180 F.3d at 473 (emphasis added). In so doing, we relied heavily on

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[3] *Pietras* styled this as a challenge to the district court's jurisdiction. *Pietras*, 180 F.3d at 123-24. Prior and subsequent cases treat "employee" status as a merits rather than a jurisdictional question. *See, e.g.*, *York*, 286 F.3d at 123 (affirming district court's ruling granting defendants' 12(b)(6) motion without discussion of jurisdiction).

Haavistola v. Cmty. Fire Co., 6 F.3d 211 (4th Cir. 1993), which held that disputed material facts precluded summary judgment on the question of whether a volunteer firefighter was an "employee" under Title VII. *See Pietras*, 180 F.3d at 473 (noting that the *O'Connor* court had distinguished *Haavistola*).

The WEP benefits cited by the majority opinion (reviewed in Section IV below) do not even raise an issue of fact: they are wholly incidental to WEP participants' workfare assignments and they chiefly benefit the City. Such benefits cannot be deemed compensation in lieu of wages; no one needing gainful employment could work for such a package.

IV

Viewed in light of *York*, *Pietras*, and *O'Connor*, it is clear that plaintiffs are not "employees" under Title VII. Plaintiffs cannot prevail if the benefits they received as WEP participants were *either* [A] "not sufficiently substantial" such that they amount to "compensation," *or* [B] "merely incidental to the activity performed." *York*, 286 F.3d at 126; *accord Pietras*, 180 F.3d at 473; *O'Connor*, 126 F.3d at 115-16. And their claims are insufficient on both counts.

A

Benefits are "sufficiently substantial" only when they amount to a form of compensation. *See O'Connor*, 126 F.3d at 115-116 (" '[C]ompensation . . . is an essential condition to the existence of an employer-employee relationship.' " (internal citation omitted)). WEP participants receive continued eligibility for their welfare benefits,

limited workers' compensation benefits, and reimbursements for carfare to and from work and for child care during the working day. No doubt, WEP participants prefer to get transportation and child care benefits; but no one would think that such benefits amount to "compensation" for the work; they hardly would induce anyone to spend his day maintaining City parks.

Workers' compensation is chiefly a benefit for the employer: without it, WEP participants could sue the City for tort damages. *See U.S. v. Demko*, 385 U.S. 149, 152 (1966) ("[W]here there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group."). True, the worker gets relief that is more sure and prompt, but that is no incremental advantage to WEP participants because their medical coverage would in any case be the responsibility of the government.

The majority opinion emphasizes that WEP participants must work in order to maintain their eligibility for welfare benefits. But such reliance on the receipt of governmental cash benefits runs afoul of *O'Connor* as well as 42 U.S.C. § 608(c), for reasons set forth in Section II of this opinion.

B

Benefits can be tantamount to remuneration only if they are sufficiently "substantial," in themselves or in tandem with a wage. The law therefore discounts benefits that are incidental to employment (*i.e.* benefits or accommodations that one needs only *because* one is working). Thus, non-cash benefits that are "merely incidental to the activit[ies] performed" are not compensation. *York*, 286 F.3d at 126.

WEP participants receive: carfare, which ensures the attendance of participants at WEP assignments scattered throughout the City; and child-care expense reimbursement, which is paid only while the participant is at work. The majority concedes that "child care and transportation expenses . . . are payments that are necessary only because the recipient works." Maj. Op. at 7711. Worker's compensation, which covers only workplace injuries, is similarly incidental.

No person seeking gainful employment would accept as full compensation the cost of getting to work plus insurance for on-the-job injury: thus, for example, a miner works for wages and benefits that profit the miner, not for rides on the mineshaft elevator, a head-lamp, and the canary.

C

The majority opinion creates a circuit split; the only other circuit to consider the question now before us came out the other way. *See Johns v. Stewart*, 57 F.3d 1544, 1557-59 (10th Cir. 1995) (holding that workfare participants were not employees). The majority opinion declines to follow *Johns* on a number of grounds, none persuasive.

First, the majority opinion notes that *Johns* was a case under the Fair Labor Standards Act ("FLSA"), not Title VII. *See* Maj. Op. at 7708. The distinction proves too much, however, because the definition of "employee" in the FLSA is considerably more inclusive than the common law definition used in Title VII. *See* 29 U.S.C. §§ 203(g),(e) (defining "employ" under the FLSA as including "to suffer or permit to work" and "employee" as "any individual employed by an employer"); *Frankel v*

Bally, Inc., 987 F.2d 86, 89 (2d Cir. 1993) ("Title VII do[es] not contain the same expansive definition of the term 'employ' used in the FLSA."). The *Johns* analysis is therefore applicable *a fortiori*. Moreover, decisions in the FLSA context hold that individuals in programs designed to prepare them for employment are not employees, and thereby confirm that WEP participants are not employed.[4]

Second, the majority observes that the Department of Labor ("DOL"), the agency charged with interpreting the FLSA, has implicitly rejected *Johns*. Maj. Op. at 7708. The apparent source of this purported rejection is a DOL "Guidance" in the form of questions and answers, which notes that "[w]elfare recipients would probably be considered employees [under FLSA] in many, if not most, of the work activities described in the new welfare law." Similarly, the majority relies on a compliance manual promulgated by the EEOC—the agency charged with interpreting Title VII—to support its view that WEP participants are employees under 42 U.S.C. § 2000e(f). Maj. Op. at 7705-07.

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[4] Even under the FLSA, "[a]n individual may work for a[n employer] and nevertheless not be an 'employee.' " *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 300 n.21 (1985). In deciding whether individuals fall within the FLSA's broad definition of "employee," courts focus on the purpose of the program that is purported to create an employment relationship. Thus, a plaintiff who performed closely-supervised work nevertheless is not an employee under the "economic realities" test if the plaintiff's reason for participating in the program is to further his own training or rehabilitation. *See Williams v. Strickland*, 87 F.3d 1064, 1067-68 (9th Cir. 1996); *cf. Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947) (holding that plaintiffs who performed work under close supervision were nevertheless not "employees" under the FLSA, but were instead more like students in school, since they received no direct remuneration but instead received training for a short period, after which some were offered jobs).

However, the majority concedes that a DOL guidance and an EEOC manual are entitled to no deference beyond their "power to persuade." *Id.* (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). The (hedged) assertion in the DOL guidance is without an express or implied basis; it is unpersuasive because that which does not explain cannot persuade. Nor am I persuaded by the EEOC compliance manual; and it wouldn't matter if I were, because the EEOC's interpretation cannot be squared with our precedent in *O'Connor*, *Pietras*, and *York*.

Third, the majority opinion speculates that the *Johns* plaintiffs may not have "received the full range of benefits owing to WEP participants" and that they may not have been "required to perform useful work." Maj. Op. at 7708. The phrase "full range of benefits" is an absurd misdescription; and the relevant passage in *Johns* gives no support to the majority's speculation about the nature of the benefits received or the work performed by the *Johns* plaintiffs:

> [a]lthough [the workfare] participants may perform the same functions as regular employees at some of the projects to which they are assigned, they differ from state employees in that they do not receive the same salary, safe working conditions, job security, career development, Social Security, pension rights, collective bargaining, or grievance procedures as do the actual employees.

Johns, 57 F.3d at 1559 (quoting *Klaips v. Bergland*, 715 F.2d 477, 483 (10th Cir. 1983)).

Finally, the majority opinion suggests that *Johns* rested on an "artificial dichotomy" between employment and

WEP participation. *See* Maj. Op. at 7708-09. According to the majority, this assumption runs afoul of our decision in *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1539-40 (2d Cir. 1996) (holding that plaintiffs, who were officers and directors of a corporation, could be employees in certain capacities even if they were not employees in other capacities). But the *Johns* court nowhere presumed that a welfare recipient could not be an employee; the *Johns* court stated—as a matter of fact, not presumption—that the workfare participants at issue were "completely unlike state employees in every respect." *Johns*, 57 F.3d at 1558-59. Further, the *Johns* court focused (as we must under *O'Connor*, *Pietras*, and *York*) on whether the plaintiffs received compensation from their putative employer for the work they performed. *Id.* at 1558-59.

In short, here as in *Johns*, a person who cleans public parks or answers City phones to preserve welfare benefits is not working for wages, *see* 42 U.S.C. § 608(c); *O'Connor*, 126 F.3d at 116 n.2, and is receiving no compensation even if the government picks up the person in the morning, drops her off at night, offers to watch her children (if any) during working hours, or provides her with work-clothes. The record in this case makes clear that, under our precedents, the benefits received by WEP participants are both [i] insubstantial and [ii] incidental to their workfare assignments. It follows that they have not been hired by the City of New York and they cannot be employees for the purposes of Title VII.

* * *

For the reasons stated above, I would affirm the district court's ruling that participants in New York City's WEP program are not "employees" under the common law meaning of that term incorporated into Title VII. I therefore would not reach the City's implied preemption arguments that are discussed and rejected in the majority opinion.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse Foley Square, in the City of New York, on the 27 day of May two thousand four.

UNITED STATES OF AMERICA, NORMA COLON,

Plaintiff - Appellants,

MARIA E. GONZALEZ, TAMMY AUER,
THERESA CALDWELL-BENJAMIN,
TONJA MCGHEE,

Intervenor-Plaintiff - Appellants,

v.

CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, JASON TURNER, individually and in capacity as Commissioner of New York City Human Resources Administration, GEORGE SANTIAGO, in his individual capacity,

Defendant - Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees City of New York, New York City Housing Authority, Jason Turner and George Santiago.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to

any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: _____

Motion Staff Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiffs,

-against-

01 CV 4604 (RCC)

CITY OF NEW YORK and NEW YORK CITY HOUSING AUTHORITY,

Defendants.

NORMA COLON,

Plaintiffs,

01 CV 8797 (LTS)

-against-

CITY OF NEW YORK, JASON TURNER and GEORGE SANTIAGO,

Defendants.

Richard Conway Casey, U.S.D.J.:

Defendants City of New York and New York City Housing Authority have filed a motion to dismiss United States of America v. City of New York and New York City Housing Authority on the grounds that the Court lacks subject matter jurisdiction and that there is no federal claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(1) & (6). Originally, seven

welfare beneficiaries participating in the City's Work Experience Program ("WEP") filed complaints with the United States Equal Employment Opportunity Commission ("EEOC") claiming that they had been sexually or racially harassed during the course of their participation in WEP. The EEOC investigated the complaints and referred all seven to the United States Department of a Justice, which conducted its own investigation. The federal government treated the seven complaints as related throughout the course of its investigation, however, the U.S. Attorney for the Southern District of New York filed its suit in May 2001 on behalf of only four recipients. The United States claims that the City and the Housing Authority violated Title VII of the Civil Rights Act of 1964 when their supervisory employees allegedly harassed the four WEP participants.[1]

Subsequently, in September 2001, Plaintiff Norma Colon filed a suit against the City of New York and two individuals. Ms. Colon was one of the original seven WEP participants to complain to the EEOC. The U.S. Attorney, however, chose not to include her claim in its suit against the

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[1] The women, Tammy Auer, Theresa Caldwell-Benjamin, Maria Gonzaletand Tonya McGhee, have filed motions to intervene in the United States' case. The Defendants do not oppose the motions of Caldwell-Benjamin, Gonzalez or McGhee. There is opposition with respect to Auer's pending motion, however, because she includes state law claims.

City. Ms. Colon's case was assigned to Judge Laura Taylor Swain. As in the United States v. New York City, et al. case, Defendant City of New York has filed a motion to dismiss Plaintiff Colon's claims. Accordingly, as the City's arguments for dismissing both cases rest on the same legal theory and the circumstances giving rise to both cases are similar, this Court agreed to accept the Colon case as related to the United States case for the purpose of deciding these motions.

I. Background

For the purposes of the motions, the Court accepts as true the allegations set forth in the two complaints. In 1996 Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), codified in the Social Security Act at 42 U.S.C. § 601, et seq., which created the federally funded welfare program, Temporary Assistance to Needy Families ("TANF'), to replace Aid to Families with Dependent Children ("AFDC"). One of the purposes of PRWORA is to give states more flexibility in operating their welfare programs. 42 U.S.C. § 601. Accordingly, New York State enacted a welfare reform act to comply with the TANF program. Thus, New York City, with reimbursement by the State, must provide assistance and care for anyone in the City who is "unable to provide for himself." N.Y. Soc. Serv. Law § 62(1). PRWORA requires that a percentage of welfare recipients

in each state participate in "work activities." 42 U.S.C. § 607(a). New York City's WEP was designed to comply with this requirement. N.Y. Soc. Serv. Law § 336.

WEP participants are assigned to work in public and non-profit agencies. N.Y. Soc. Serv. Law § 336(d). The number of hours each participant must work in a week is calculated by dividing the amount of his or her TANF benefit by the minimum wage. United States Complaint ¶ 20; Colon Complaint ¶ 22; N.Y. Soc. Serv. Law §336-c(2)(b). The agency to which the WEP worker is assigned supervises, trains and schedules the participant. United States Complaint ¶¶ 21-22; Colon Complaint ¶¶ 24-25. WEP participants may receive transportation reimbursement, authorized child care expenses and, if necessary, workers compensation. N.Y. Soc. Serv. Law §§ 332-a; 336-c(2)(c).

A. United States of America v. New York City, et al.

Allegedly, the four women on whose behalf the United States brings this suit under Title VII of the Civil Rights Act of 1964, were subjected to hostile work environments at their WEP assignments. Tammy Auer was assigned clerical duties at the Department of Sanitation in Staten Island and claims she was sexually harassed by her supervisor. United States Complaint ¶¶ 31-56. Theresa Caldwell-Benjamin is an African-American

woman who was assigned painting tasks at the City's Department of Parks in Staten Island. She claims to have observed a noose and racist caricatures while on the job. Id. at ¶¶ 111-125. Maria Gonzalez performed clerical functions at the City's Human Resources Administration in Manhattan and she claims to have been subjected to a hostile work environment by her supervisor, based on her sex, and retaliated against after she complained of his behavior. Id. at ¶¶ 81-110. Finally, Tonja McGhee was assigned to the Housing Authority in Brooklyn and claims she, too, was sexually harassed by her supervisor, with whom she had previously had a consensual sexual relationship. Id. at ¶¶ 57-80. All four women complained to the EEOC, which found reasonable cause to believe that their allegations were true and subsequently referred their claims to the Department of Justice.

B. Colon v. New York City , et al.

Norma Colon was also a WEP participant and filed her suit against the City of New York and two individuals under Title VII, New York Human Rights Law, N.Y. Exec. § 290 et seq., and the New York City Human Rights Law, N.Y.C. Code § 8-101 et seq. Plaintiff Colon claims she was subjected to a hostile work environment and quid pro quo harassment based on her sex by her supervisor at her WEP assignment. Colon Complaint ¶¶ 27-61. Colon left her WEP assignment in June

1997 to care for her children after her WEP supervisor allegedly refused to help her with childcare. Id. ¶¶ 59-60. The EEOC issued Colon a right to sue letter in June 2001.

II. Discussion

A. Standard for Motion to Dismiss for Failure to State a Claim

Defendants argue that Congress did not intend for Title VII to protect welfare recipients from discrimination and WEP participants are not "employees" for purposes of Title VII and, accordingly, the Court lacks subject matter jurisdiction and Plaintiff's have failed to state a claim upon which relief can be granted. As "[g]enerations of jurists have struggled with the difficulty of distinguishing between Rules 12(b)(1) and 12(b)(6) in federal question cases, . . . the preferable practice is to assume that jurisdiction exists and proceed to determine the merits of the claim pursuant to [Rule 12(b)(6)] ..... Nowak v. Ironworkers Local 6 Pension Fund. 81 F.3d 1182, 1188 (2d Cir.1996) (citing 2A James W. Moore, et al., Moore's Federal Practice ¶ 12.07, at 12-60 (2ded. 1995)). Accordingly, the Court will treat Defendants' application as a motion to dismiss for failure to state a claim upon which relief may be granted. See York v. The Ass'n of the Bar of the City of New York, No. 00 Civ.5961 (DC), 2001 WL 776944, at *2 n.2 (July 11, 2001) (treating motion to dismiss under Federal Rules 12(b)(1) and 12(b)(6) as a

motion to dismiss for failure to state a claim and holding a bar association volunteer is not an employee for purposes of Title VII).

A court will dismiss a complaint only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In weighing a motion to dismiss for failure to state a claim, the court will accept as true the facts presented in the complaint and view the pleadings in the light most favorable to, and draw reasonable inferences in favor of, the non-moving party." Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993). The question is not whether Plaintiffs will ultimately prevail, rather it is "whether the claimant is entitled to offer evidence to support [the] claim." Villager Pond, Inc. v. Town of Darien. 56 F.3d 375, 378 (2d Cir. 1995) (quoting Scheur v. Rhodes. 416 U.S. 232, 236 (1974)).

B. Applicability of Title VII

1. Language of the Statute and Legislative History

Defendants submit that Title VII is not applicable to WEP participants and that, therefore, Plaintiffs have failed to state a claim upon which relief can be granted. According to Defendants, the plain language of the PRWORA and its statutory history dictate that Title VII not apply to the claims at issue. The

statute instructs that "[n)o officer or employee of the Federal Government may regulate the conduct of the States ... or enforce any provision ... except to the extent expressly provided in this part" 42 U.S.C. § 617. "This part" refers to Part A, which covers "Block Grants to States for Temporary Assistance for Needy Families." 42 U.S.C. §§ 604-619. Within Part A, Congress listed the following "Nondiscrimination provisions" applicable to programs receiving funds through TANF: "(1) The Age Discrimination Act of 1975 (42 U.S.C. 6101 et. seq.), (2) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), (3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), and (4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et. seq.). 42 U.S.C. § 608(d).

Defendants argue that Title VII's absence from § 608(d) is fatal to Plaintiffs' claims. According to Defendants, the listed statutes prohibit discrimination in federally funded programs. For example, Congress chose the Age Discrimination Act, which prohibits discrimination in federally funded programs, 42 U.S.C. § 6101 ("It is the purpose of this chapter to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance."), over the Age Discrimination in Employment Act, 29 U.S.C. § 621, ("It is therefore the purpose of this chapter to promote employment of older persons based on theif ability rather than age [and] to

prohibit arbitraty age discrimination in employment . . . ."), which obviously prohibits age discrimination by employers. Defendants submit that the statutes listed in § 608(d) focus on federally funded programs rather than employment, which demonstrates that Title VII's employment protections were not intended to apply to welfare recipients.[2]

Further, Defendants point out that Congress adopted the language of § 608(d) in place of a broader anti-discrimination provision. In an earlier version, drafters had suggested the following paragraph:

> Sec. 484. (a) In assigning participants in the program under this part to any program activity, the State agency shall assure that ... (3) individuals are not discriminated against on the basis of race, sex, national origin, religion, age or handicapping condition, and all participants will have such rights as are available under any applicable Federal, State, or local law prohibiting discrimination.

H.R. Rep. No.104-651,104th Cong., 2d Sess. 908 (1996). This language was not adopted in PRWORA.

Additionally, Defendants submit that an amendment to PRWORA demonstrates that Congress did not intend Title VII to provide protection to the welfare recipients. The Balanced

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[2] Defendants do not respond to Plaintiffs' point that the ADA also protects against discrimination in the employment context.

Budget Act of 1997 added Welfare to Work grants to PRWORA and included the following section:

> (iii) Nondiscrimination. In addition to the protections provided under the provision of law specified in section 608(c)[3] of this title, an individual may not be discriminated against by reason of gender with respect to participation in work activities engaged in under a program operated with funds provided under this paragraph.

42 U.S.C. § 603(a)(5)(I)(iii). The amendment goes on to require, in extensive detail, that states provide their own anti-discrimination mechanisms. 42 U.S.C. § 603(a)(5)(I)(iv); *See also N.Y. See. Serv. Law* § 331(3) (prohibiting discrimination of welfare beneficiaries). Thus, in Defendants' view, Congas acknowledged that Title VII does notprovidc welfare recipients with discrimination protection in their work activities. Rather than adding Title VII to the list of protections in § 608(d), however, Congress required states to formulate their own protections. 42 U.S.C. § 603(a)(5)(I)(iv).[4]

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[3] Defendants submit that "608(c)" is a typographical error and that the section referenced should be 608(d), which is the non-discrimination provision in Part A of PRWORA. Section 608(c) concerns sanctions against the recipient.

[4] The availability of Title VII's protections to welfare recipients was a common topic during Congressional debates over the Welfare-to-Work provision in the Balanced Budget Act of 1997. Some Members of Congress opposed Title VII's apparent inapplicability. See e.g., 143 Cong. Rec. H4569 at 4574 (Rep. Mink: "Under this legislation, welfare recipients,

virtually all of whom are women, will not be protected against sexual harassment and sex discrimination as in Title VII of the Civil Rights Act...") 4587 (Rep. Conyer: "I am strongly opposed to provisions. . . providing that participants in the workfare program will not be considered employees for purposes of Federal law.); 5036-37 (Rep. Levin: "They still do not have protections against sexual harassment. Let me just ask as someone moves from welfare to work, as they should, why should they not have protection against sexual harassment?"). Others, however, thought the amendment's language would sufficiently protect recipients from gender discrimination. See e.g., 143 Cong. Rec. H4569, 5035 (Rep. Talent: "The whole point of the work provisions that we passed last year was to require work in exchange for welfare benefits and therefore to make work attractive vis-a-vis welfare ... and it is working because we have decreased the attractiveness of welfare vis-a-vis work. We have protections against sex discrimination. ... But let us not load up the work requirements to the point that they are unaffordable to the State and that they make actual work unattractive vis-a-vis welfare."); 5037 (Rep. Shaw: "That says that the motion rejects language in the House bill that treats certain TANF participants as nonemployeas, therefore denying them protection under the Federal antidiscrimination laws .... Let us look as existing law, ... That has a provision . . . 'The following provisions of law shall apply to any program or activity which receives funds provided under this part.' Now what applies? The Age Discrimination Act of 1975.. . Section 504 of the Rehabilitation Act of 1973. . , The Americans with Disabilities Act of 1990 ... Title VI of the Civil Rights Act of 1964. . . is in the bill. . . . . Read the law for once and quit posturing. Then what we do is that we go back and we add to those antidiscrmunation provisions . . . .. It says, 'In addition to the protections provided under the provisions of law specified ... an individual may not be discriminated against with regard to participation in work activities by reason of gender.'. . . Now, the question is, is there a remedy? Yes, we provide in here that the States have to set up a remedy.").

Plaintiffs disagree with Defendants' interpretation of the statute and the legislative intent.

First, Plaintiffs argue that Defendants' preemption argument should not hold sway. United States v. General Dynamics Corp., 19 F.3d 770, 774 (2d Cir.1994) ("[W]ell established jurisprudence . . . strongly disfavors preemption of federal statutory law by another federal statute absent express manifestations of preemption intent."); but see Defendants Reply Memorandum in United States case at 6 (noting the question is not one of preemption rather it is of inapplicability). Plaintiffs submit that Title VII is absent from the discrimination statutes specifically listed in § 608(d) because the TANF initiative was a substantial change from AFDC. Accordingly, Congress wanted to be clear that TANF was a federal program and the statutes prohibiting discrimination in such programs, as listed in § 608(d), would still apply.

Second, Plaintiffs point out that both the Department of Labor and the Department of Health and Human Services were charged with administering certain provisions of PRWORA. See e.g., 42 U.S.C. § 603. Both agencies' regulations contemplate that Title VII applies to welfare beneficiaries participating in work activities. Department of Labor Provision Regarding Welfare-to-Work, 20 C.F.R. § 645.255(c) (considering Title VII complaints by welfare-to-work participants); Department of

Health and Human Services Provision Regarding TANF Participants, 45 C.F.R. § 260.35(b) (explaining § 608(d) does not limit applicability of other Federal laws, including nondiscrimination laws); See e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (holding courts must give effect to agency regulations containing reasonable interpretation of an ambiguous statute).

With respect to the amendments encapsulated in the Balanced Budget Act of 1997, Plaintiffs claim that agency regulations and the amendment's legislative history support the application of Title VII to welfarebeneficiaries. According to Plaintiffs, when considering the welfare to work provision of the Balanced Budget Act, a provision was introduced that would override a Department of Labor guideline that beneficiaries be considered employees, but that provision was rejected. 143 Cong. Rec. H5031.

2. WEP Participants are Not Title VII Employees

The Court finds it unnecessary to make a broad determination about whether Congress intended for Title VII to apply to PRWORA and the Court's decision will not rest on interpreting legislative intent. The proper inquiry is whether Title VII permits the WEP participants a cause of action. Even assuming Title VII is not inapplicable to PRWORA, the WEP

participants herein cannot be considered "employees" for Title VII purposes.

Title VII defines an "employee" as someone who is "employed by an employer." 42 U.S.C. § 2000e(f). "Courts have assumed, however, that in using the term employee Congress had in mind `the conventional master-servant relationship as understood by common-law agency doctrine." Pietras v. Bd. of Fire Comm'rs of the Farmingyjlle Fire Dist 180 F.3d 468, 473 (2d Cir. 1999) (quoting Nationwide Mut, Ins. Co. v. Dardea 503 U.S. 318, 322-23 (1992)). Plaintiffs submit that the determination of whether someone is an employee for Title VII purposes requires a fact sensitive application of the common-law agency principles outlined in Community Care for Creative Non-Violence v Reid, 490 U.S. 730, 751-52 (1989). Id. (listing determinative factors as (1) the hiring party's right to control the manner and means by which the project is accomplished; (2) the skill required; (3) the source of instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in

business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party); see also Elisenbag v. Advance Relocation & Storage. Co., 237 F.3d 111, 112 (2d Cir. 2000) (holding courts should place particular weight on the extent to which the hiring party controls the manner and means by which the worker completes her assigned task). While suggesting that discovery is required to formulate answers to most of these inquiries, Plaintiffs argue that the women received economic benefits for their work and that Defendants controlled their work by determining their hours, location and nature of their assignments.

Plaintiffs, however, fail to make allowance for the prerequisite to the application of the common law agency test, which is whether the working individual was actually hired by the defendant. O'Connor v. Davis, 126 F.3d 112,115 (2d Cir.1997) (explaining the antecedent question to a Reid factor analysis is whether the plaintiff was "hired" by the defendant and using "direct or indirect remuneration" as the test for determining whether an intern is an employee for Title VII purposes). The Second Circuit has noted that the factors outlined in Reid are particularly useful when determining whether a worker is an employee or independent contractor. O'Connor v. Davis, 126 F.3d at 115 (listing cases); see also Eisenberg, 237 F.3d at 115 (examining Reid factors to determine whether plaintiff was an employee or independent contractor). "(T]he common feature shared by both the employee

and the independent contractor is that they are 'hired part[ies],' and thus, a prerequisite to considering whether an individual is one or the other under common law agency principles is that the individual have been hired in the first instance. " O'Connor v. Davis, 126 F.3d at 115 (internal citations omitted). In the case at bar, however, there is no allegation that Plaintiffs were hired by the Defendants. United States Complaint ¶ 31("HRA assigned Tammy Auer, a WEP participant, to work at the City's Department of Sanitation"); ¶ 112 ("HRA assigned Ms. Caldwell-Benjamin, a WEP participant, to work for the City's Department of Parks."); ¶81("Maria Gonzalez, a WEP participant was assigned to a clerical position at HRA's offices . . . ."); ¶ 157 ("HRA assigned Tonja McGhee, a WEP participant, to work for the Housing Authority."); Colon Complaint ¶ 27 ("HRA assigned Norma Colon to work at HRA's Office of Employment Services . . . . ". Thus, as in O'Connor, it is unnecessary to utilize the Reid factors here. O'Connor v. Davis 126 F.3d at 115-16 (explaining that "only where a 'hire' has occurred should the common law agency analysis be undertaken"); see also York v. The Ass'n of the Bar of the City of New York, 2001 WL 776944, at *4 (finding, without applying the Reid factors, that a volunteer is not a Title VII employee).

Title VII prohibits discrimination in employment, yet it "does not protect plaintiffs who do not qualify as employees." York v. The Ass'n of the Bar of the City of New York, 2001 WL 776944, at *3 (citing Kean v. City of Rochester, 93 F.3d 38, 45 (2d Cir.1996)); see also O'Connor v. Davis, 126 F.3d at 116 (dismissing intern's Title VII claim because she is not an "employee'). "Plaintiffs who have without question rendered service to an appreciative defendant are not deemed Title VII 'employees' solely by dint of their labor." Tadros v. Coleman, 717 F. Supp. 996, 1003 (S.D.N.Y.1989). The question turns, therefore, on whether Plaintiffs received "direct or indirect remuneration" from the alleged employer. O'Connor v. Davis, 126 F.3d at 116; Pietras v. Bd. of Fire Comm'rs of the Farmingville Fire Dist, 180 F.3d at 473; Haavistola v. Cmty. Fire Co, 6 F.3d 211, 221-22 (4th Cir.1993).

Plaintiffs herein did not receive employment-related benefits from Defendants. Their welfare benefits were not considered wages. 42 U.S.C. § 608(c) ("A penalty imposed by a State against a family of an individual by reason of the failure of the individual to comply with a requirement under the State program funded under this part shall not be construed to be a reduction in any wage paid to the individual."). Defendants did not provide the WEP participants with sick pay, health insurance or vacation time. O'Connor v. Davis, 126 F.3d at 112 (noting

plaintiff intern lacked these benefits and therefore holding she was not an employee). Nor did the participants receive a disability pension, survivors' benefits, group life insurance or scholarships for their dependants upon their death. Cf Haavistola v. Cmty. Fire Co., 6 F.3d at 221-22 (finding those benefits were received by volunteer fireman and holding such benefits evidenced an employment relationship). If the participants did not comply with the WEP, their family's benefits were not terminated. 42 U.S.C. § 607(e)(1)(A); N.Y. Soc. Serv. Law § 342 (reducing recipient's benefits pro rata according to recipient's non-compliance, but not reducing family's benefits). Although WEP participants may receive workers' compensation, they are not provided with the same level of compensation as actual employees. N.Y. Soc. Serv. Law § 336c(2)(c) ("such recipients are provided appropriate workers' compensation or equivalent protection for on-the-job injuries .... but not necessarily at the same benefit level, as they are provided to other persons in the same or similar positions . . . ."). Every benefit Plaintiffs received resulted from their status as welfare recipients. N.Y. Soc. Serv. Law §§ 332(2) (listing social services officials' responsibilities for welfare recipients in work programs); 332-a (same). Thus, in the clear absence of either direct of indirect economic remuneration by the Defendants, the WEP participants here are not employees within the meaning of

Title VII and their discrimination claim under that statute must fail. O'Connor v. Davis, 126 F.3d at 116.[5]

III. Conclusion

For the reasons explained above, Defendants' motion to dismiss the complaint in United States v. City of New York. et al. and Colon y. City of New York, et al. are granted. Accordingly, the

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[5] As the Department of Labor and the Department of Health and Human Services are not charged with administering Title VII, the Court does not find their suggestions regarding the applicability of Title VII to WEP participants convincing.

While the EEOC is charged with administering Title VII, the Court does not find its directives on the subject persuasive. The EEOC suggests that a "welfare" recipient participating in work related activities as a condition of receipt of benefits will likely be an 'employee.' . . . The determination of whether there is an employee relationship is based on the same factors outlined above." EEOC Directives Transmittal 915.003 at Sec. 2-III(2) www.eeoc.gov/docs/threshold.html. The "factors" referred to are the common law agency principles relied on in Community Care for Creative Non-Violence v. Reid 490 U.S. 730, 751-52 (1989). As explained above, the Court finds the Second Circuit's precedent regarding proper applicability of the Reid factors more persuasive than the EEOC's directive. Christensen v. Harris County. 529 U.S. 576, 587 (2000) ("[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law - do not warrant Chevron-style deference. [Rather they] are 'entitled to respect' . . . but only to the extent they have the 'power to persuade.") (internal citations omitted); O'Connor v. Davis, 126 F.3d 112, 115-116 (2d Cir.1997) ("[O]nly where a hire has occurred should the common law agency analysis be undertaken,").

Court finds it unnecessary to review Ms. Tammy Auth's motion to intervene as it is moot. The Court declines to exercise supplemental jurisdiction over Plaintiff Colon's state law claims. The Clerk of the Court is ordered to close the cases.

So ordered.

Richard Conway Casey, U.S.D.J.

March 8, 2002
New York, New York

UNITED STATES CODE

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 7--SOCIAL SECURITY

SUBCHAPTER IV--GRANTS TO STATES FOR AID AND SERVICES TO NEEDY FAMILIES WITH CHILDREN AND FOR CHILD-WELFARE SERVICES

PART A--BLOCK GRANTS TO STATES FOR TEMPORARY ASSISTANCE FOR NEEDY FAMILIES

§ 601. Purpose

(a) In general

The purpose of this part is to increase the flexibility of States in operating a program designed to--

(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;

(2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;

(3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and

(4) encourage the formation and maintenance of two-parent families.

(b) No individual entitlement

This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.

§ 602. Eligible States: State plan

(a) In general

As used in this part, the term "eligible State" means, with respect to a fiscal year, a State that, during the 27-month period ending with the close of the 1st quarter of the fiscal year, has submitted to the Secretary a plan that the Secretary has found includes the following:

(1) Outline of family assistance program

(A) General provisions

A written document that outlines how the State intends to do the following:

(i) Conduct a program, designed to serve all political subdivisions in the State (not necessarily in a uniform manner), that provides assistance to needy families with (or expecting) children and provides parents with job preparation, work, and support services to enable them to leave the program and become self-sufficient.

(ii) Require a parent or caretaker receiving assistance under the program to engage in work (as defined by the State) once the State determines the parent or caretaker is ready to engage in work, or once the parent or caretaker has received assistance under the program for 24 months (whether or not consecutive), whichever is earlier, consistent with section 607(e)(2) of this title.

(iii) Ensure that parents and caretakers receiving assistance under the program engage in work activities in accordance with section 607 of this title.

(iv) Take such reasonable steps as the State deems necessary to restrict the use and disclosure of information about individuals and families receiving assistance under the program attributable to funds provided by the Federal Government.

(v) Establish goals and take action to prevent and reduce the incidence of out-of-wedlock pregnancies, with special emphasis on teenage pregnancies, and establish numerical goals for reducing the illegitimacy ratio of the State (as defined in section 603(a)(2)(C)(iii) of this title) for calendar years 1996 through 2005.

(vi) Conduct a program, designed to reach State and local law enforcement officials, the education system, and relevant counseling services, that provides education and training on the problem of statutory rape so that teenage pregnancy prevention programs may be expanded in scope to include men.

(B) Special provisions

(i) The document shall indicate whether the State intends to treat families moving into the State from another State differently than other families under the program, and if so, how the State intends to treat such families under the program.

(ii) The document shall indicate whether the State intends to provide assistance under the program to individuals who are not citizens of the United States, and if so, shall include an overview of such assistance.

(iii) The document shall set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment, including an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process.

(iv) Not later than 1 year after August 22, 1996, unless the chief executive officer of the State opts out of this provision by notifying the Secretary, a State shall, consistent with the exception provided in section 607(e)(2) of this title, require a parent or caretaker receiving assistance under the program who, after receiving such assistance for 2 months is not exempt from work requirements and is not engaged in work, as determined under section 607(c) of this title, to participate in community service employment, with minimum hours per week and tasks to be determined by the State.

(2) Certification that the State will operate a child support enforcement program

A certification by the chief executive officer of the State that, during the fiscal year, the State will operate a child

support enforcement program under the State plan approved under part D.

(3) Certification that the State will operate a foster care and adoption assistance program

A certification by the chief executive officer of the State that, during the fiscal year, the State will operate a foster care and adoption assistance program under the State plan approved under part E, and that the State will take such actions as are necessary to ensure that children receiving assistance under such part are eligible for medical assistance under the State plan under subchapter XIX of this chapter.

(4) Certification of the administration of the program

A certification by the chief executive officer of the State specifying which State agency or agencies will administer and supervise the program referred to in paragraph (1) for the fiscal year, which shall include assurances that local governments and private sector organizations

> (A) have been consulted regarding the plan and design of welfare services in the State so that services are provided in a manner appropriate to local populations; and
>
> (B) have had at least 45 days to submit comments on the plan and the design of such services.

(5) Certification that the State will provide Indians with equitable access to assistance

A certification by the chief executive officer of the State that, during the fiscal year, the State will provide each member of an Indian tribe, who is domiciled in the State and is not eligible for assistance under a tribal family assistance plan approved under section 612 of this title, with equitable access to assistance under the State program

funded under this part attributable to funds provided by the Federal Government.

(6) Certification of standards and procedures to ensure against program fraud and abuse

A certification by the chief executive officer of the State that the State has established and is enforcing standards and procedures to ensure against program fraud and abuse, including standards and procedures concerning nepotism, conflicts of interest among individuals responsible for the administration and supervision of the State program, kickbacks, and the use of political patronage.

(7) Optional certification of standards and procedures to ensure that the State will screen for and identify domestic violence

(A) In general

At the option of the State, a certification by the chief executive officer of the State that the State has established and is enforcing standards and procedures to--

(i) screen and identify individuals receiving assistance under this part with a history of domestic violence while maintaining the confidentiality of such individuals;

(ii) refer such individuals to counseling and supportive services; and

(iii) waive, pursuant to a determination of good cause, other program requirements such as time limits (for so long as necessary) for individuals receiving assistance, residency requirements, child support cooperation requirements, and family cap provisions,

in cases where compliance with such requirements would make it more difficult for individuals receiving assistance under this part to escape domestic violence or unfairly penalize such individuals who are or have been victimized by such violence, or individuals who are at risk of further domestic violence.

(B) Domestic violence defined

For purposes of this paragraph, the term "domestic violence" has the same meaning as the term "battered or subjected to extreme cruelty", as defined in section 608(a)(7)(C)(iii) of this title.

(b) Plan amendments

Within 30 days after a State amends a plan submitted pursuant to subsection (a) of this section, the State shall notify the Secretary of the amendment.

(c) Public availability of State plan summary

The State shall make available to the public a summary of any plan or plan amendment submitted by the State under this section.

603. Grants to States

(a) Grants

(1) Family assistance grant

(A) In general

Each eligible State shall be entitled to receive from the Secretary, for each of fiscal years 1996, 1997, 1998, 1999, 2000, 2001, and ~~2002~~, a grant in an amount equal to the State family assistance grant.

(B) State family assistance grant defined

As used in this part, the term "State family assistance grant" means the greatest of--

(i) 1/3 of the total amount required to be paid to the State under former section 603 of this title (as in effect on September 30, 1995) for fiscal years 1992, 1993, and 1994 (other than with respect to amounts expended by the State for child care under subsection (g) or (i) of former section 602 of this title (as so in effect));

(ii) (I) the total amount required to be paid to the State under former section 603 of this title for fiscal year 1994 (other than with respect to amounts expended by the State for child care under subsection (g) or (i) of former section 602 of this title (as so in effect)); plus

(II) an amount equal to 85 percent of the amount (if any) by which the total amount required to be paid to the State under former section 603(a)(5) of this title for emergency assistance for fiscal year 1995 exceeds the total amount required to be paid to the State under former section 603(a)(5) of this title for fiscal year 1994, if, during fiscal year 1994 or 1995, the Secretary approved under former section 602 of this title an amendment to

the former State plan with respect to the provision of emergency assistance; or

(iii) 4/3 of the total amount required to be paid to the State under former section 603 of this title (as in effect on September 30, 1995) for the 1st 3 quarters of fiscal year 1995 (other than with respect to amounts expended by the State under the State plan approved under part F (as so in effect) or for child care under subsection (g) or (i) of former section 602 of this title (as so in effect)), plus the total amount required to be paid to the State for fiscal year 1995 under former section 603(1) of this title (as so in effect).

(C) Total amount required to be paid to the State under former section 603 of this title defined

As used in this part, the term "total amount required to be paid to the State under former section 603 of this title" means, with respect to a fiscal year--

(i) in the case of a State to which section 1308 of this title does not apply, the sum of--

(I) the Federal share of maintenance assistance expenditures for the fiscal year, before reduction pursuant to subparagraph (B) or (C) of section 603(b)(2) of this title (as in effect on September 30, 1995), as reported by the State on ACF Form 231;

(II) the Federal share of administrative expenditures (including administrative expenditures for the development of management information systems) for the fiscal year, as reported by the State on ACF Form 231;

(III) the Federal share of emergency assistance expenditures for the fiscal

year, as reported by the State on ACF Form 231;

(IV) the Federal share of expenditures for the fiscal year with respect to child care pursuant to subsections (g) and (i) of former section 602 of this title (as in effect on September 30, 1995), as reported by the State on ACF Form 231; and

(V) the Federal obligations made to the State under section 603 of this title for the fiscal year with respect to the State program operated under part F (as in effect on September 30, 1995), as determined by the Secretary, including additional obligations or reductions in obligations made after the close of the fiscal year; and

(ii) in the case of a State to which section 1308 of this title applies, the lesser of

(I) the sum described in clause (i); or

(II) the total amount certified by the Secretary under former section 603 of this title (as in effect during the fiscal year) with respect to the territory.

(D) Information to be used in determining amounts

(i) For fiscal years 1992 and 1993

(I) In determining the amounts described in subclauses (I) through (IV) of subparagraph (C)(i) for any State for each of fiscal years 1992 and 1993, the Secretary shall use information available as of April 28, 1995.

(II) In determining the amount described in subparagraph (C)(i)(V) for any State for

each of fiscal years 1992 and 1993, the Secretary shall use information available as of January 6, 1995.

(ii) For fiscal year 1994

In determining the amounts described in subparagraph (C)(i) for any State for fiscal year 1994, the Secretary shall use information available as of April 28, 1995.

(iii) For fiscal year 1995

(I) In determining the amount described in subparagraph (B)(ii)(II) for any State for fiscal year 1995, the Secretary shall use the information which was reported by the States and estimates made by the States with respect to emergency assistance expenditures and was available as of August 11, 1995.

(II) In determining the amounts described in subclauses (I) through (III) of subparagraph (C)(i) for any State for fiscal year 1995, the Secretary shall use information available as of October 2, 1995.

(III) In determining the amount described in subparagraph (C)(i)(IV) for any State for fiscal year 1995, the Secretary shall use information available as of February 28, 1996.

(IV) In determining the amount described in subparagraph (C)(i)(V) for any State for fiscal year 1995, the Secretary shall use information available as of October 5, 1995.

(E) Appropriation

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for fiscal years 1996, 1997, 1998, 1999, 2000, 2001, and 2002 such sums as are necessary for grants under this paragraph.

(2) Bonus to reward decrease in illegitimacy ratio

(A) In general

Each eligible State shall be entitled to receive from the Secretary a grant for each bonus year.

(B) Amount of grant

(i) In general

If, for a bonus year, none of the eligible States in Guam, the Virgin Islands, or American Samoa, then the amount of the grant shall be--

(I) $20,000,000 if there are 5 eligible States; or

(II) $25,000,000 if there are fewer than 5 eligible States.

(ii) Amount if certain territories are eligible

If, for a bonus year, Guam, the Virgin Islands, or American Samoa is an eligible State, then the amount of the grant shall be--

(I) in the case of such a territory, 25 percent of the mandatory ceiling amount (as defined in section 1308(c)(4) of this title) with respect to the territory; and

(II) in the case of a State that is not such a territory—

(aa) if there are 5 eligible States other than such territories, $20,000,000, minus 1/5 of the total amount of the grants payable under this paragraph to such territories for the bonus year; or

(bb) if there are fewer than 5 such eligible States, $25,000,000, or such lesser amount as may be necessary to ensure that the total amount of grants payable under this paragraph for the bonus year does not exceed $100,000,000.

(C) Definitions

As used in this paragraph:

(i) Eligible State

(I) In general

The term "eligible State" means a State that the Secretary determines meets the following requirements:

(aa) The State demonstrates that the illegitimacy ratio of the State for the most recent 2-year period for which such information is available decreased as compared to the illegitimacy ratio of the State for the previous 2-year period, and the magnitude of the decrease for the State for the period is not exceeded by the magnitude of the corresponding decrease for 5 or more other States for the period. In the case of a State that is not a territory specified in subparagraph (B), the comparative magnitude of the decrease for the State shall be

determined without regard to the magnitude of the corresponding decrease for any such territory.

(bb) The rate of induced pregnancy terminations in the State for the calendar year for which the most recent data are available is less than the rate of induced pregnancy terminations in the State for calendar year 1995.

(II) Disregard of changes in data due to changed reporting methods

In making the determination required by subclause (I), the Secretary shall disregard--

(aa) any difference between the illegitimacy ratio of a State for a calendar year and the illegitimacy ratio in a State for calendar year 1995 which is attributable to a change in State methods of reporting data used to calculate the illegitimacy ratio; and

(bb) any difference between the rate of induced pregnancy terminations in a State for a calendar year and such rate for calendar year 1995 which is attributable to a change in State methods of reporting data used to calculate such rate.

(ii) Bonus year

The term "bonus year" means calendar years 1999, 2000, 2001, and 2002.

(iii) Illegitimacy ratio

The term "illegitimacy ratio" means, with respect to a State and a period-

(I) the number of out-of-wedlock births to mothers residing in the State that occurred during the period; divided by

(II) the number of births to mothers residing in the State that occurred during the period.

(D) Appropriation

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for fiscal years 1999 through 2002, such sums as are necessary for grants under this paragraph.

(3) Supplemental grant for population increases in certain States

(A) In general

Each qualifying State shall, subject to subparagraph (F), be entitled to receive from the Secretary

(i) for fiscal year 1998 a grant in an amount equal to 2.5 percent of the total amount required to be paid to the State under former section 603 of this title (as in effect during fiscal year 1994) for fiscal year 1994; and

(ii) for each of fiscal years 1999, 2000, and 2001, a grant in an amount equal to the sum of--

(I) the amount (if any) required to be paid to the State under this paragraph for the immediately preceding fiscal year; and

(II) 2.5 percent of the sum of-

(aa) the total amount required to be paid to the State under former section 603 of this title (as in effect during fiscal year 1994) for fiscal year 1994; and

(bb) the amount (if any) required to be paid to the State under this paragraph for the fiscal year preceding the fiscal year for which the grant is to be made.

(B) Preservation of grant without increases for States failing to remain qualifying States

Each State that is not a qualifying State for a fiscal year specified in subparagraph (A)(ii) but was a qualifying State for a prior fiscal year shall, subject to subparagraph (F), be entitled to receive from the Secretary for the specified fiscal year, a grant in an amount equal to the amount required to be paid to the State under this paragraph for the most recent fiscal year for which the State was a qualifying State.

(C) Qualifying State

(i) In general

For purposes of this paragraph, a State is a qualifying State for a fiscal year if

(I) the level of welfare spending per poor person by the State for the immediately preceding fiscal year is less than the national average level of State welfare spending per poor person for such preceding fiscal year; and

(II) the population growth rate of the State (as determined by the Bureau of the Census)

for the most recent fiscal year for which information is available exceeds the average population growth rate for all States (as so determined) for such most recent fiscal year.

(ii) State must qualify in fiscal year 1998

Notwithstanding clause (i), a State shall not be a qualifying State for any fiscal year after 1998 by reason of clause (i) if the State is not a qualifying State for fiscal year 1998 by reason of clause (i).

(iii) Certain States deemed qualifying States

For purposes of this paragraph, a State is deemed to be a qualifying State for fiscal years 1998, 1999, 2000, and 2001 if--

(I) the level of welfare spending per poor person by the State for fiscal year 1994 is less than 35 percent of the national average level of State welfare spending per poor person for fiscal year 1994; or

(II) the population of the State increased by more than 10 percent from April 1, 1990 to July 1, 1994, according to the population estimates in publication CB94-204 of the Bureau of the Census.

(D) Definitions

As used in this paragraph:

(i) Level of welfare spending per poor person

The term "level of State welfare spending per poor person" means, with respect to a State and a fiscal year--

(I) the sum of--

(aa) the total amount required to be paid to the State under former section 603 of this title (as in effect during fiscal year 1994) for fiscal year 1994; and

(bb) the amount (if any) paid to the State under this paragraph for the immediately preceding fiscal year; divided by

(II) the number of individuals, according to the 1990 decennial census, who were residents of the State and whose income was below the poverty line.

(ii) National average level of State welfare spending per poor person

The term "national average level of State welfare spending per poor person" means, with respect to a fiscal year, an amount equal to--

(I) the total amount required to be paid to the States under former section 603 of this title (as in effect during fiscal year 1994) for fiscal year 1994; divided by

(II) the number of individuals, according to the 1990 decennial census, who were residents of any State and whose income was below the poverty line.

(iii) State

The term "State" means each of the 50 States of the United States and the District of Columbia.

(E) Appropriation

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for fiscal years 1998, 1999, 2000, and 2001 such sums as are necessary for grants under this paragraph, in a total amount not to exceed $800,000,000.

(F) Grants reduced pro rata if insufficient appropriations

If the amount appropriated pursuant to this paragraph for a fiscal year is less than the total amount of payments otherwise required to be made under this paragraph for the fiscal year, then the amount otherwise payable to any State for the fiscal year under this paragraph shall be reduced by a percentage equal to the amount so appropriated divided by such total amount.

(G) Budget scoring

Notwithstanding section 907(b)(2) of Title 2, the baseline shall assume that no grant shall be made under this paragraph after fiscal year 2001.

(H) Reauthorization of grants for fiscal year 2002

Notwithstanding any other provision of this paragraph--

> (i) any State that was a qualifying State under this paragraph for fiscal year 2001 or any prior fiscal year shall be entitled to receive from the Secretary for fiscal year 2002 a grant in an amount equal to the amount required to be paid to the State under this paragraph for the most recent

fiscal year in which the State was a qualifying State;

(ii) subparagraph (G) shall be applied as if "2002" were substituted for "2001"; and

(iii) out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for fiscal year 2002 such sums as are necessary for grants under this subparagraph.

(4) Bonus to reward high performance States

(A) In general

The Secretary shall make a grant pursuant to this paragraph to each State for each bonus year for which the State is a high performing State.

(B) Amount of grant

(i) In general

Subject to clause (ii) of this subparagraph, the Secretary shall determine the amount of the grant payable under this paragraph to a high performing State for a bonus year, which shall be based on the score assigned to the State under subparagraph (D)(i) for the fiscal year that immediately precedes the bonus year.

(ii) Limitation

The amount payable to a State under this paragraph for a bonus year shall not exceed 5 percent of the State family assistance grant.

(C) Formula for measuring State performance

Not later than 1 year after August 22, 1996, the Secretary, in consultation with the National Governors' Association and the American Public Welfare Association, shall develop a formula for measuring State performance in operating the State program funded under this part so as to achieve the goals set forth in section 601(a) of this title.

(D) Scoring of State performance; setting of performance thresholds

For each bonus year, the Secretary shall--

(i) use the formula developed under subparagraph (C) to assign a score to each eligible State for the fiscal year that immediately precedes the bonus year; and

(ii) prescribe a performance threshold in such a manner so as to ensure that--

(I) the average annual total amount of grants to be made under this paragraph for each bonus year equals $200,000,000; and

(II) the total amount of grants to be made under this paragraph for all bonus years equals $1,000,000,000.

(E) Definitions

As used in this paragraph:

(i) Bonus year

The term "bonus year" means fiscal years 1999, 2000, 2001, 2002, and 2003.

(ii) High performing State

The term "high performing State" means, with respect to a bonus year, an eligible State whose score assigned pursuant to subparagraph (D)(i) for the fiscal year immediately preceding the bonus year equals or exceeds the performance threshold prescribed under subparagraph (D)(ii) for such preceding fiscal year.

(F) Appropriation

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for fiscal years 1999 through 2003 $1,000,000,000 for grants under this paragraph.

(5) Welfare-to-work grants

(A) Formula grants

(i) Entitlement

A State shall be entitled to receive from the Secretary of Labor a grant for each fiscal year specified in subparagraph (H) of this paragraph for which the State is a welfare-to-work State, in an amount that does not exceed the lesser of-

(I) 2 times the total of the expenditures by the State (excluding qualified State expenditures (as defined in section 609(a)(7)(B)(i) of this title) and any expenditure described in subclause (I), (II) or (IV) of section 609(a)(7)(B)(iv) of this title) during the period permitted under subparagraph (C)(vii) of this paragraph for the expenditure of funds under the grant for activities described in subparagraph (C)(i) of this paragraph; or

(II) the allotment of the State under clause (iii) of this subparagraph for the fiscal year.

(ii) Welfare-to-work State

A State shall be considered a welfare-to-work State for a fiscal year for purposes of this paragraph if the Secretary of Labor determines that the State meets the following requirements:

(I) The State has submitted to the Secretary of Labor and the Secretary of Health and Human Services (in the form of an addendum to the State plan submitted under section 602 of this title) a plan which--

(aa) describes how, consistent with this subparagraph, the State will use any funds provided under this subparagraph during the fiscal year;

(bb) specifies the formula to be used pursuant to clause (vi) to distribute funds in the State, and describes the process by which the formula was developed;

(cc) contains evidence that the plan was developed in consultation and coordination with appropriate entities in sub-State areas;

(dd) contains assurances by the Governor of the State that the private industry council (and any alternate agency designated by the Governor under item (ee)) for a service delivery area in the State will coordinate the expenditure of any funds provided under this

subparagraph for the benefit of the service delivery area with the expenditure of the funds provided to the State under section 603(a)(1) of this title;

(ee) if the Governor of the State desires to have an agency other than a private industry council administer the funds provided under this subparagraph for the benefit of 1 or more service delivery areas in the State, contains an application to the Secretary of Labor for a waiver of clause (vii)(I) with respect to the area or areas in order to permit an alternate agency designated by the Governor to so administer the funds; and

(ff) describes how the State will ensure that a private industry council to which information is disclosed pursuant to section 603(a)(5)(K) or 654a(f)(5) of this title has procedures for safeguarding the information and for ensuring that the information is used solely for the purpose described in that section.

(II) The State has provided to the Secretary of Labor an estimate of the amount that the State intends to expend during the period permitted under subparagraph (C)(vii) of this paragraph for the expenditure of funds under the grant (excluding expenditures described in section 609(a)(7)(B)(iv) of this title (other than subclause (III) thereof)) pursuant to this paragraph.

(III) The State has agreed to negotiate in good faith with the Secretary of Health

and Human Services with respect to the substance and funding of any evaluation under section 613(;) of this title, and to cooperate with the conduct of any such evaluation.

(IV) The State is an eligible State for the fiscal year.

(V) The State certifies that qualified State expenditures (within the meaning of section 609(a)(7) of this title) for the fiscal year will be not less than the applicable percentage of historic State expenditures (within the meaning of section 609(a)(7) of this title) with respect to the fiscal year.

(iii) Allotments to welfare-to-work States

(I) In general

Subject to this clause, the allotment of a welfare-to-work State for a fiscal year shall be the available amount for the fiscal year, multiplied by the State percentage for the fiscal year.

(II) Minimum allotment

The allotment of a welfare-to-work State (other than Guam, the Virgin Islands, or American Samoa) for a fiscal year shall not be less than 0.25 percent of the available amount for the fiscal year.

(III) Pro rata reduction

Subject to subclause (II), the Secretary of Labor shall make pro rata reductions in the allotments to States under this clause for a fiscal year as necessary to ensure that the total of the allotments does not

exceed the available amount for the fiscal year.

(iv) Available amount

As used in this subparagraph, the term "available amount" means, for a fiscal year, the sum of--

(I) 75 percent of the sum of--

(aa) the amount specified in subparagraph (H) for the fiscal year, minus the total of the amounts reserved pursuant to subparagraphs (E), (F), and (G) for the fiscal year; and

(bb) any amount reserved pursuant to subparagraph (E) for the immediately preceding fiscal year that has not been obligated; and

(II) any available amount for the immediately preceding fiscal year that has not been obligated by a State or, other than funds reserved by the State for distribution under clause (vi)(M) and funds distributed pursuant to clause (vi)(I) in any State in which the service delivery area is the State.

(v) State percentage

As used in clause (iii), the term "State percentage" means, with respect to a fiscal year, 1/2 of the sum of--

(I) the percentage represented by the number of individuals in the State whose income is less than the poverty line divided by the number of such individuals in the United States; and

(II) the percentage represented by the number of adults who are recipients of assistance under the State program funded under this part divided by the number of adults in the United States who are recipients of assistance under any State program funded under this part.

(vi) Procedure for distribution of funds within States

(I) Allocation formula

A State to which a grant is made under this subparagraph shall devise a formula for allocating not less than 85 percent of the amount of the grant among the service delivery areas in the State, which-

(aa) determines the amount to be allocated for the benefit of a service delivery area in proportion to the number (if any) by which the population of the area with an income that is less than the poverty line exceeds 7.5 percent of the total population of the area, relative to such number for all such areas in the State with such an excess, and accords a weight of not less than 50 percent to this factor;

(bb) may determine the amount to be allocated for the benefit of such an area in proportion to the number of adults residing in the area who have been recipients of assistance under the State program funded under this part (whether in effect before or after the amendments made by section 103(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of

1996 first applied to the State) for at least 30 months (whether or not consecutive) relative to the number of such adults residing in the State; and

(cc) may determine the amount to be allocated for the benefit of such an area in proportion to the number of unemployed individuals residing in the area relative to the number of such individuals residing in the State.

(II) Distribution of funds

(aa) In general

If the amount allocated by the formula to a service delivery area is at least $100,000, the State shall distribute the amount to the entity administering the grant in the area.

(bb) Special rule

If the amount allocated by the formula to a service delivery area is less than $100,000, the sum shall be available for distribution in the State under subclause (III) during the fiscal year.

(III) Projects to help long-term recipients of assistance enter unsubsidized jobs

The Governor of a State to which a grant is made under this subparagraph may distribute not more than 15 percent of the grant funds (plus any amount required to be distributed under this subclause by reason of subclause (11)(bb)) to projects that appear likely to help long-term

recipients of assistance under the State program funded under this part (whether in effect before or after the amendments made by section 103(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 first applied to the State) enter unsubsidized employment.

(vii) Administration

(I) Private industry councils

The private industry council for a service delivery area in a State shall have sole authority, in coordination with the chief elected official (as defined in section 2801 of Title 29) of the area, to expend the amounts distributed under clause (vi)(II)(aa) for the benefit of the service delivery area, in accordance with the assurances described in clause (ii)(I)(dd) provided by the Governor of the State.

(II) Enforcement of coordination of expenditures with other expenditures under this part

Notwithstanding subclause (1) of this clause, on a determination by the Governor of a State that a private industry council (or an alternate agency described in clause (ii)(I)(dd)) has used funds provided under this subparagraph in a manner inconsistent with the assurances described in clause (ii)(I)(dd)-

(aa) the private industry council (or such alternate agency) shall remit the funds to the Governor; and

(bb) the Governor shall apply to the Secretary of Labor for a waiver of subclause (I) of this clause with

respect to the service delivery area or areas involved in order to permit an alternate agency designated by the Governor to administer the funds in accordance with the assurances.

(III) Authority to permit use of alternate administering agency

The Secretary of Labor shall approve an application submitted under clause (ii)(I)(ee) or subclause (1I)(bb) of this clause to waive subclause (1) of this clause with respect to 1 or more service delivery areas if the Secretary determines that the alternate agency designated in the application would improve the effectiveness or efficiency of the administration of amounts distributed under clause (vi)(II)(aa) for the benefit of the area or areas.

(viii) Data to be used in determining the number of adult TANF recipients

For purposes of this subparagraph, the number of adult recipients of assistance under a State program funded under this part for a fiscal year shall be determined using data for the most recent 12-month period for which such data is available before the beginning of the fiscal year.

(ix) Reversion of unallotted formula funds

If at the end of any fiscal year any funds available under this subparagraph have not been allotted due to a determination by the Secretary that any State has not met the requirements of clause (ii), such funds shall be transferred to the General Fund of the Treasury of the United States.

(B) Competitive grants

(i) In general

The Secretary of Labor shall award grants in accordance with this subparagraph, in fiscal years 1998 and 1999, for projects proposed by eligible applicants, based on the following:

(I) The effectiveness of the proposal in--

(aa) expanding the base of knowledge about programs aimed at moving recipients of assistance under State programs funded under thus part who are least job ready into unsubsidized employment.

(bb) moving recipients of assistance under State programs funded under this part who are least job ready into unsubsidized employment; and

(cc) moving recipients of assistance under State programs funded under this part who are least job ready into unsubsidized employment, even in labor markets that have a shortage of low-skill jobs.

(II) At the discretion of the Secretary of Labor, any of the following:

(aa) The history of success of the applicant in moving individuals with multiple barriers into work.

(bb) Evidence of the applicant's ability to leverage private, State, and local resources.

(cc) Use by the applicant of State and local resources beyond those required by subparagraph (A).

(dd) Plans of the applicant to coordinate with other organizations at the local and State level.

(ee) Use by the applicant of current or former recipients of assistance under a State program funded under this part as mentors, case managers, or service providers.

(ii) Eligible applicants

As used in clause (i), the term "eligible applicant" means a private industry council for a service delivery area in a State, a political subdivision of a State, or a private entity applying in conjunction with the private industry council for such a service delivery area or with such a political subdivision, that submits a proposal developed in consultation with the Governor of the State.

(iii) Determination of grant amount

In determining the amount of a grant to be made under this subparagraph for a project proposed by an applicant, the Secretary of Labor shall provide the applicant with an amount sufficient to ensure that the project has a reasonable opportunity to be successful, taking into account the number of long-term recipients of assistance under a State program funded under this part, the level of unemployment, the job opportunities and job growth, the poverty rate, and such other factors as the Secretary of Labor deems appropriate, in the area to be served by the project.

(iv) Consideration of needs of rural areas and cities with large concentrations of poverty

In making grants under this subparagraph, the Secretary of Labor shall consider the needs of rural areas and cities with large concentrations of residents with an income that is less than the poverty line.

(v) Funding

For grants under this subparagraph for each fiscal year specified in subparagraph (H), there shall be available to the Secretary of Labor an amount equal to the sum of--

(I) 25 percent of the sum of--

(aa) the amount specified in subparagraph (H) for the fiscal year, minus the total of the amounts reserved pursuant to subparagraphs (E), (F), and (G) for the fiscal year; and

(bb) any amount reserved pursuant to subparagraph (E) for the immediately preceding fiscal year that has not been obligated; and

(II) any amount available for grants under this subparagraph for the immediately preceding fiscal year that has not been obligated.

(C) Limitations on use of funds

(i) Allowable activities

An entity to which funds are provided under this paragraph shall use the funds to move individuals into and keep individuals in lasting unsubsidized employment by means of any of the following:

(I) The conduct and administration of community service or work experience programs.

(II) Job creation through public or private sector employment wage subsidies.

(III) On-the-job training.

(IV) Contracts with public or private providers of readiness, placement, and post-employment services, or if the entity is not a private industry council or workforce investment board, the direct provision of such services.

(V) Job vouchers for placement, readiness, and postemployment services.

(VI) Job retention or support services if such services are not otherwise available.

(VII) Not more than 6 months of vocational educational or job training.

Contracts or vouchers for job placement services supported by such funds must require that at least 1/2 of the payment occur after an eligible individual placed into the workforce has been in the workforce for 6 months.

(ii) General eligibility

An entity that operates a project with funds provided under this paragraph may expend funds provided to the project for the benefit of recipients of assistance under the program funded under this part of the State in which the entity is located who--

(I) has received assistance under the State program funded under this part (whether in effect before or after the amendments made by section 103 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 first apply to the State) for at least 30 months (whether or not consecutive); or

(II) within 12 months, will become ineligible for assistance under the State program funded under this part by reason of a durational limit on such assistance, without regard to any exemption provided pursuant to section 608(a)(7)(C) of this title that may apply to the individual.

(iii) Noncustodial parents

An entity that operates a project with funds provided under this paragraph may use the funds to provide services in a form described in clause (i) to noncustodial parents with respect to whom the requirements of the following subclauses are met:

(I) The noncustodial parent is unemployed, underemployed, or having difficulty in paying child support obligations.

(II) At least 1 of the following applies to a minor child of the noncustodial parent

(with preference in the determination of the noncustodial parents to be provided services under this paragraph to be provided by the entity to those noncustodial parents with minor children who meet, or who have custodial parents who meet, the requirements of item (aa)):

(aa) The minor child or the custodial parent of the minor child meets the requirements of subclause (1) or (II of clause (ii).

(bb) The minor child is eligible for, or is receiving, benefits under the program funded under this part.

(cc) The minor child received benefits under the program funded under this part in the 12-month period preceding the date of the determination but no longer receives such benefits.

(dd) The minor child is eligible for, or is receiving, assistance under the Food Stamp Act of 1977, benefits under the supplemental security income program under title XVI of this Act [42 U.S.C.A. § 1381 et seq.], medical assistance under title XIX of this Act [42 U.S.C.A. § 1396 et seq.], or child health assistance under title XXI of this Act [42 U.S.C.A. § 1397 et seq.].

(III) In the case of a noncustodial parent who becomes enrolled in the project on or after the date of the enactment of this clause, the noncustodial parent is in compliance with the terms of an oral or written personal responsibility contract

entered into among the noncustodial parent, the entity, and (unless the entity demonstrates to the Secretary that the entity is not capable of coordinating with such agency) the agency responsible for administering the State plan under part D of this subchapter [42 U.S.C.A. § 651 et seq.], which was developed taking into account the employment and child support status of the noncustodial parent, which was entered into not later than 30 (or, at the option of the entity, not later than 90) days after the noncustodial parent was enrolled in the project, and which, at a minimum, includes the following:

(aa) A commitment by the noncustodial parent to cooperate, at the earliest opportunity, in the establishment of the paternity of the minor child, through voluntary acknowledgement or other procedures, and in the establishment of a child support order.

(bb) A commitment by the noncustodial parent to cooperate in the payment of child support for the minor child, which may include a modification of an existing support order to take into account the ability of the noncustodial parent to pay such support and the participation of such parent in the project.

(cc) A commitment by the noncustodial parent to participate in employment or related activities that will enable the noncustodial parent to make regular child support payments, and if the noncustodial parent has not attained 20 years of

age, such related activities may include completion of high school, a general equivalency degree, or other education directly related to employment.

(dd) A description of the services to be provided under this paragraph, and a commitment by the noncustodial parent to participate in such services, that are designed to assist the noncustodial parent obtain and retain employment, increase earnings, and enhance the financial and emotional contributions to the well-being of the minor child.

In order to protect custodial parents and children who may be at risk of domestic violence, the preceding provisions of this subclause shall not be construed to affect any other provision of law requiring a custodial parent to cooperate in establishing the paternity of a child or establishing or enforcing a support order with respect to a child, or entitling a custodial parent to refuse, for good cause, to provide such cooperation as a condition of assistance or benefit under any program, shall not be construed to require such cooperation by the custodial parent as a condition of participation of either parent in the program authorized under this paragraph, and shall not be construed to require a custodial parent to cooperate with or participate in any activity under this clause. The entity operating a project under this clause with funds provided under this paragraph shall consult with domestic violence prevention and intervention organizations in the development of the project.

(iv) Targeting of hard to employ individuals with characteristics associated with long-term welfare dependence

An entity that operates a project with funds provided under this paragraph may expend not more than 30 percent of all funds provided to the project for programs that provide assistance in a form described in clause (i)--

(I) to recipients of assistance under the program funded under this part of the State in which the entity is located who have characteristics associated with long-term welfare dependence (such as school dropout, teen pregnancy, or poor work history), including, at the option of the State, by providing assistance in such form as a condition of receiving assistance under the State program funded under this part;

(II) to children--

(aa) who have attained 18 years of age but not 25 years of age; and

(bb) who, before attaining 18 years of age, were recipients of foster care maintenance payments (as defined in section 675(4) of this title) under part E of this subchapter [42 U.S.C.A. § 670 et seq.] or were in foster care under the responsibility of a State;

(III) to recipients of assistance under the State program funded under this part, determined to have significant barriers to self-sufficiency, pursuant to criteria established by the local private industry council; or

(IV) to custodial parents with incomes below 100 percent of the poverty line (as defined in section 9902(2) of this

title, including any revision required by such section, applicable to a family of the size involved).

To the extent that the entity does not expend such funds in accordance with the preceding sentence, the entity shall expend such funds in accordance with clauses (ii) and (iii), and, as appropriate, clause (v).

(v) Authority to provide work-related services to individuals who have reached the 5 year limit

An entity that operates a project with funds provided under this paragraph may use the funds to provide assistance in a form described in clause (i) of this subparagraph to, or for the benefit of, individuals who (but for section 608(a)(7) of this title) would be eligible for assistance under the program funded under this part of the State in which the entity is located.

(vi) Relationship to other provisions of this part

(I) Rules governing use of funds

The rules of section 604 of this title, other than subsections (b), (f), and (h) of section 604 of this title, shall not apply to a grant made under this paragraph.

(II) Rules governing payments to States

The Secretary of Labor shall carry out the functions otherwise assigned by section 605 of this title to the Secretary of Health and Human Services with respect to the grants payable under this paragraph.

(III) Administration

Section 616 of this title shall not apply to the programs under this paragraph.

(vii) Prohibition against use of grant funds for any other fund matching requirement

An entity to which funds are provided under this paragraph shall not use any part of the funds, nor any part of State expenditures made to match the funds, to fulfill any obligation of any State, political subdivision, or private industry council to contribute funds under section 603(b) or 618 of this title or any other provision of this chapter or other Federal law.

(viii) Deadline for expenditure

An entity to which funds are provided under this paragraph shall remit to the Secretary of Labor any part of the funds that are not expended within 5 years after the date the funds are so provided.

(ix) Regulations

Within 90 days after August 5, 1997, the Secretary of Labor, after consultation with the Secretary of Health and Human Services and the Secretary of Housing and Urban Development, shall prescribe such regulations as may be necessary to implement this paragraph.

(x) Reporting requirements

The Secretary of Labor, in consultation with the Secretary of Health and Human

Services, States, and organizations that represent State or local governments, shall establish requirements for the collection and maintenance of financial and participant information and the reporting of such information by entities carrying out activities under this paragraph.

(D) Definitions

(i) Individuals with income less than the poverty line

For purposes of this paragraph, the number of individuals with an income that is less than the poverty line shall be determined for a fiscal year--

(I) based on the methodology used by the Bureau of the Census to produce and publish intercensal poverty data for States and counties (or, in the case of Puerto Rico, the Virgin Islands, Guam, and American Samoa, other poverty data selected by the Secretary of Labor); and

(II) using data for the most recent year for which such data is available before the beginning of the fiscal year.

(ii) Private industry council

As used in this paragraph, the term "private industry council" means, with respect to a service delivery area, the private industry council or local workforce investment board established for the service delivery area pursuant to title I of the Workforce Investment Area

of 1998 [29 U.S.C.A. 5 2801 et seq.], as appropriate.

(iii) Service delivery area

As used in this paragraph, the term "service delivery area" shall have the meaning given such term for purposes of the Job Training Partnership Act.

(E) Funding for Indian tribes

1 percent of the amount specified in subparagraph (H) for fiscal year 1998 and $15,000,000 of the amount so specified for fiscal year 1999 shall be reserved for grants to Indian tribes under section 612(a)(3) of this title.

(F) Funding for evaluations of welfare-to-work programs

0.6 percent of the amount specified in subparagraph (H) for fiscal year 1998 and $9,000,000 of the amount so specified for fiscal year 1999 shall be reserved for use by the Secretary to carry out section 613(;) of this title.

(G) Funding for evaluation of abstinence education programs

(i) In general

0.2 percent of the amount specified in subparagraph (H) for fiscal year 1998 and $3,000,000 of the amount so specified for fiscal year 1999 shall be reserved for use by the Secretary to evaluate programs under section 710 of this title, directly or through grants, contracts, or interagency agreements.

(ii) Authority to use funds for evaluations of welfare-to-work programs

Any such amount not required for such evaluations shall be available for use by the Secretary to carry out section 613(;) of this title.

(iii) Deadline for outlays

Outlays from funds used pursuant to clause (i) for evaluation of programs under section 710 of this title shall not be made after fiscal year 2005.

(iv) Interim report

Not later than January 1, 2002, the Secretary shall submit to the Congress an interim report on the evaluations referred to in clause (i).

(H) Appropriations

(i) In general

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for grants under this paragraph--

(I) $1,500,000,000 for fiscal year 1998; and

(II) $1,400,000,000 for fiscal year 1999.

(ii) Availability

The amounts made available pursuant to clause (i) shall remain available for such

period as is necessary to make the grants provided for in this paragraph.

(I) Worker protections

(i) Nondisplacement in work activities

(I) General prohibition

Subject to this clause, an adult in a family receiving assistance attributable to funds provided under this paragraph may fill a vacant employment position in order to engage in a work activity.

(II) Prohibition against violation of contracts

A work activity engaged in under a program operated with funds provided under this paragraph shall not violate an existing contract for services or a collective bargaining agreement, and such a work activity that would violate a collective bargaining agreement shall not be undertaken without the written concurrence of the labor organization and employer concerned.

(III) Other prohibitions

An adult participant in a work activity engaged in under a program operated with funds provided under this paragraph shall not be employed or assigned--

(aa) when any other individual is on layoff from the same or any substantially equivalent job;

(bb) if the employer has terminated the employment of any regular

employee or otherwise caused an involuntary reduction in its workforce with the intention of filling the vacancy so created with the participant; or

(cc) if the employer has caused an involuntary reduction to less than full time in hours of any employee in the same or a substantially equivalent job.

(ii) Health and safety

Health and safety standards established under Federal and State law otherwise applicable to working conditions of employees shall be equally applicable to working conditions of other participants engaged in a work activity under a program operated with funds provided under this paragraph.

(iii) Nondiscrimination

In addition to the protections provided under the provisions of law specified in section 608(c) of this title, an individual may not be discriminated against by reason of gender with respect to participation in work activities engaged in under a program operated with funds provided under this paragraph.

(iv) Grievance procedure

(I) In general

Each State to which a grant is made under this paragraph shall establish and maintain a procedure for grievances or

complaints from employees alleging violations of clause (i) and participants in work activities alleging violations of clause (i), (ii), or (iii).

(II) Hearing

The procedure shall include an opportunity for a hearing.

(III) Remedies

The procedure shall include remedies for violation of clause (i), (ii), or (iii), which may continue during the pendency of the procedure, and which may include--

(aa) suspension or termination of payments from funds provided under this paragraph;

(bb) prohibition of placement of a participant with an employer that has violated clause (i), (ii), or (iii);

(cc) where applicable, reinstatement of an employee, payment of lost wages and benefits, and reestablishment of other relevant terms, conditions and privileges of employment; and

(dd) where appropriate, other equitable relief.

(IV) Appeals

(aa) Filing

Not later than 30 days after a grievant or complainant receives an adverse decision under the

procedure established pursuant to subclause (I), the grievant or complainant may appeal the decision to a State agency designated by the State which shall be independent of the State or local agency that is administering the programs operated with funds provided under this paragraph and the State agency administering, or supervising the administration of, the State program funded under this part.

(bb) Final determination

Not later than 120 days after the State agency designated under item (aa) receives a grievance or complaint made under the procedure established by a State pursuant to subclause (I), the State agency shall make a final determination on the appeal.

(v) Rule of interpretation

This subparagraph shall not be construed to affect the authority of a State to provide or require workers' compensation.

(vi) Nonpreemption of State law

The provisions of this subparagraph shall not be construed to preempt any provision of State law that affords greater protections to employees or to other participants engaged in work activities under a program funded under this part than is afforded by such provisions of this subparagraph.

(J) Information disclosure

If a State to which a grant is made under this section establishes safeguards against the use or disclosure of information about applicants or recipients of assistance under the State program funded under this part, the safeguards shall not prevent the State agency administering the program from furnishing to a private industry council the names, addresses, telephone numbers, and identifying case number information in the State program funded under this part, of noncustodial parents residing in the service delivery area of the private industry council, for the purpose of identifying and contacting noncustodial parents regarding participation in the program under this paragraph.

(b) Contingency fund

(1) Establishment

There is hereby established in the Treasury of the United States a fund which shall be known as the "Contingency Fund for State Welfare Programs" (in this section referred to as the "Fund").

(2) Deposits into fund

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for fiscal years 1997, 1998, 1999, 2000, 2001, and 2002 such sums as are necessary for payment to the Fund in a total amount not to exceed $2,000,000,000, reduced by the sum of the dollar amounts specified in paragraph (6)(C)(ii).

(3) Grants

(A) Provisional payments

If an eligible State submits to the Secretary a request for funds under this paragraph during an eligible month, the Secretary shall, subject to this paragraph, pay to the State, from amounts appropriated pursuant to paragraph (2), an amount equal to the amount of funds so requested.

(B) Payment priority

The Secretary shall make payments under subparagraph (A) in the order in which the Secretary receives requests for such payments.

(C) Limitations

(i) Monthly payment to a State

The total amount paid to a single State under subparagraph (A) during a month shall not exceed 1/12 of 20 percent of the State family assistance grant.

(ii) Payments to all States

The total amount paid to all States under subparagraph (A) during fiscal years 1997 through 2002 shall not exceed the total amount appropriated pursuant to paragraph (2).

(4) Eligible month

As used in paragraph (3)(A), the term "eligible month" means, with respect to a State, a month in the 2-month period that begins with any month for which the State is a needy State.

(5) Needy State

For purposes of paragraph (4), a State is a needy State for a month if--

(A) the average rate of--

(i) total unemployment in such State (seasonally adjusted) for the period consisting of the most recent 3 months for which data for all States are published equals or exceeds 6.5 percent; and

(ii) total unemployment in such State (seasonally adjusted) for the 3-month period equals or exceeds 110 percent of such average rate for either (or both) of the corresponding 3-month periods ending in the 2 preceding calendar years; or

(B) as determined by the Secretary of Agriculture (in the discretion of the Secretary of Agriculture), the monthly average number of individuals (as of the last day of each month) participating in the food stamp program in the State in the then most recently concluded 3-month period for which data are available exceeds by not less than 10 percent the lesser of--

(i) the monthly average number of individuals (as of the last day of each month) in the State that would have participated in the food stamp program in the corresponding 3-month period in fiscal year 1994 if the amendments made by titles IV and VIII of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 had been in effect throughout fiscal year 1994; or

(ii) the monthly average number of individuals (as of the last day of each month) in the State that would have participated in the food stamp program in the corresponding 3-month period in fiscal year 1995 if the amendments made by titles IV and VIII of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 had been in effect throughout fiscal year 1995.

(6) Annual reconciliation

(A) In general

Notwithstanding paragraph (3), if the Secretary makes a payment to a State under this subsection in a fiscal year, then the State shall remit to the Secretary, within 1 year after the end of the first subsequent period of 3 consecutive months for which the State is not a needy State, an amount equal to the amount (if any) by which--

(i) the total amount paid to the State under paragraph (3) of this subsection in the fiscal year; exceeds

(ii) the product of--

(I) the Federal medical assistance percentage for the State (as defined in section 1396d(b) of this title, as such section was in effect on September 30, 1995);

(II) the State's reimbursable expenditures for the fiscal year; and

(III) 1/12 times the number of months during the fiscal year for which the

Secretary made a payment to the State under such paragraph (3).

(B) Definitions

As used in subparagraph (A):

(i) Reimbursable expenditures

The term "reimbursable expenditures" means, with respect to a State and a fiscal year, the amount (if any) by which--

(I) countable State expenditures for the fiscal year; exceeds

(II) historic State expenditures (as defined in section 609(a)(7)(B)(iii) of this title), excluding any amount expended by the State for child care under subsection (g) or (i) of section 602 of this title (as in effect during fiscal year 1994) for fiscal year 1994.

(ii) Countable State expenditures

The term "countable expenditures" means, with respect to a State and a fiscal year--

(I) the qualified State expenditures (as defined in section 609(a)(7)(B)(i) of this title (other than the expenditures described in subclause (1)(bb) of such section) under the State program funded under this part for the fiscal year; plus

(II) any amount paid to the State under paragraph (3) during the fiscal year that is expended by the State under the State program funded under this part.

(C) Adjustment of state remittances

(i) In general

The amount otherwise required by subparagraph (A) to be remitted by a State for a fiscal year shall be increased by the lesser of--

(I) the total adjustment for the fiscal year, multiplied by the adjustment percentage for the State for the fiscal year; or

(II) the unadjusted net payment to the State for the fiscal year.

(ii) Total adjustment

As used in clause (i), the term "total adjustment" means

(I) in the case of fiscal year 1998, $2,000,000;

(II) in the case of fiscal year 1999, $9,000,000;

(III) in the case of fiscal year 2000, $16,000,000; and

(IV) in the case of fiscal year 2001, $13,000,000.

(iii) Adjustment percentage

As used in clause (i), the term "adjustment percentage" means, with respect to a State and a fiscal year--

(I) the unadjusted net payment to the State for the fiscal year; divided by

(II) the sum of the unadjusted net payments to all States for the fiscal year.

(iv) Unadjusted net payment

As used in this subparagraph, the term, "unadjusted net payment" means with respect to a State and a fiscal year--

(I) the total amount paid to the State under paragraph (3) in the fiscal year; minus

(II) the amount that, in the absence of this subparagraph, would be required by subparagraph (A) or by section 209(a)(10) of this title to be remitted by the State in respect of the payment.

(6) "State" defined

As used in this subsection, the term "State" means each of the 50 States and the District of Columbia.

(7) Annual reports

The Secretary shall annually report to the Congress on the status of the Fund.

§ 603a. Transferred

§ 604. Use of grants

(a) General rules

Subject to this part, a State to which a grant is made under section 603 of this title may use the grant --

(1) in any manner that is reasonably calculated to accomplish the purpose of this part, including to provide low income households with assistance in meeting home heating and cooling costs; or

(2) in any manner that the State was authorized to use amounts received under part A or F of this subchapter, as such parts were in effect on September 30, 1995, or (at the option of the State) August 21, 1996.

(b) Limitation on use of grant for administrative purposes

(1) Limitation

A State to which a grant is made under section 603 of this title shall not expend more than 15 percent of the grant for administrative purposes.

(2) Exception

Paragraph (1) shall not apply to the use of a grant for information technology and computerization needed for tracking or monitoring required by or under this part.

(c) Authority to treat interstate immigrants under rules of former State

A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

(d) Authority to use portion of grant for other purposes

(1) In general

Subject to paragraph (2), a State may use not more than 30 percent of the amount of any grant made to the State under section 603(a) of this title for a fiscal year to carry out a State program pursuant to any or all of the following provisions of law:

(A) Subchapter XX of this chapter.

(B) The Child Care and Development Block Grant Act of 1990 [42 U.S.C.A. § 9858 et seq.].

(2) Limitation on amount transferable to subchapter XX programs

(A) In general

A State may use not more than the applicable percent of the amount of any grant made to the State under section 603(a) of this title for a fiscal year to canrry out State programs pursuant to subchapter XX of this chapter.

(B) Applicable percent

For purposes of subparagraph (A), the applicable percent is 4.25 percent in the case of fiscal year 2001 and each succeeding fiscal year.

(3) Applicable rules

(A) In general

Except as provided in subparagraph (B) of this paragraph, any amount paid to a State under this part that is used to carry out a State program pursuant to a provision of law specified in paragraph (1) shall not be subject to the requirements of this part, but shall be subject to the requirements that apply to Federal funds provided directly under the provision of law to carry out the program, and the expenditure of any amount so used shall not be considered to be an expenditure under this part.

(B) Exception relating to subchapter XX programs

All amounts paid to a State under this part that are used to canrry out State programs pursuant to subchapter XX of this chapter shall be used only for programs and services to children or their families whose income is less than 200 percent of

the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 9902(2) of this title) applicable to a family of the size involved.

(e) Authority to reserve certain amounts for assistance

A State or tribe may reserve amounts paid to the State or tribe under this part for any fiscal year for the purpose of providing, without fiscal year limitation, assistance under the State or tribal program funded under this part.

(f) Authority to operate employment placement program

A State to which a grant is made under section 603 of this title may use the grant to make payments (or provide job placement vouchers) to State-approved public and private job placement agencies that provide employment placement services to individuals who receive assistance under the State program funded under this part.

(g) Implementation of electronic benefit transfer system

A State to which a grant is made under section 603 of this title is encouraged to implement an electronic benefit transfer system for providing assistance under the State program funded under this part, and may use the grant for such purpose.

(h) Use of funds for individual development accounts

(1) In general

A State to which a grant is made under section 603 of this title may use the grant to carry out a program to fund individual development accounts (as defined in paragraph (2)) established by individuals eligible for assistance under the State program funded under this part.

(2) Individual development accounts

(A) Establishment

Under a State program carried out under paragraph (1), an individual development account may be established by or on behalf of an individual eligible for assistance under the State program operated under this part for the purpose of enabling the individual to accumulate funds for a qualified purpose described in subparagraph (B).

(B) Qualified purpose

A qualified purpose described in this subparagraph is 1 or more of the following, as provided by the qualified entity providing assistance to the individual under this subsection:

(i) Postsecondary educational expenses

Postsecondary educational expenses paid from an individual development account directly to an eligible educational institution.

(ii) First home purchase

Qualified acquisition costs with respect, to a qualified principal residence for a qualified first-time homebuyer, if paid from an individual development account directly to the persons to whom the amounts are due.

(iii) Business capitalization

Amounts paid from an individual development account directly to a business capitalization account which is established in a federally insured financial institution and is restricted to

use solely for qualified business capitalization expenses.

(C) Contributions to be from earned income

An individual may only contribute to an individual development account such amounts as are derived from earned income, as defined in section 911(d)(2) of Title 26.

(D) Withdrawal of funds

The Secretary shall establish such regulations as may be necessary to ensure that funds held in an individual development account are not withdrawn except for 1 or more of the qualified purposes described in subparagraph (B).

(3) Requirements

(A) In general

An individual development account established under this subsection shall be a trust created or organized in the United States and funded through periodic contributions by the establishing individual and matched by or through a qualified entity for a qualified purpose (as described in paragraph (2)(B)).

(B) Qualified entity

As used in this subsection, the term "qualified entity" means--

(i) a not-for-profit organization described in section 501(c)(3) of Title 26 and exempt from taxation under section 501 (a) of Title 26; or

(ii) a State or local government agency acting in cooperation with an organization described in clause (i).

(4) No reduction in benefits

Notwithstanding any other provision of Federal law (other than Title 26) that requires consideration of 1 or more financial circumstances of an individual, for the purpose of determining eligibility to receive, or the amount of, any assistance or benefit authorized by such law to be provided to or for the benefit of such individual, funds (including interest accruing) in an individual development account under this subsection shall be disregarded for such purpose with respect to any period during which such individual maintains or makes contributions into such an account.

(5) Definitions

As used in this subsection--

(A) Eligible educational institution

The term "eligible educational institution" means the following:

(i) An institution described in section 1088(a)(1) or 1141(a) of Title 20, as such sections are in effect on August 22, 1996.

(ii) An area vocational education school (as defined in subparagraph (C) or (D) of section 2471(4) of Title 20), which is in any State (as defined in section 2471(33) of Title 20), as such sections are in effect on August 22, 1996.

(B) Post-secondary educational expenses

The term "post-secondary educational expenses" means--

(i) tuition and fees required for the enrollment or attendance of a student at an eligible educational institution, and

(ii) fees, books, supplies, and equipment required for courses of instruction at an eligible educational institution.

(C) Qualified acquisition costs

The term "qualified acquisition costs" means the costs of acquiring, constructing, or reconstructing a residence. The term includes any usual or reasonable settlement, financing, or other closing costs.

(D) Qualified business

The term "qualified business" means any business that does not contravene any law or public policy (as determined by the Secretary).

(E) Qualified business capitalization expenses

The term "qualified business capitalization expenses" means qualified expenditures for the capitalization of a qualified business pursuant to a qualified plan.

(F) Qualified expenditures

The term "qualified expenditures" means expenditures included in a qualified plan, including capital, plant, equipment, working capital, and inventory expenses.

(G) Qualified first-time homebuyer

(i) In general

The term "qualified first-time homebuyer" means a taxpayer (and, if married, the taxpayer's spouse) who has no present ownership interest in a principal residence during the 3-year period ending on the date of acquisition of the principal residence to which this subsection applies.

(ii) Date of acquisition

The term "date of acquisition" means the date on which a binding contract to acquire, construct, or reconstruct the principal residence to which this subparagraph applies is entered into.

(H) Qualified plan

The term "qualified plan" means a business plan which--

(i) is approved by a financial institution, or by a nonprofit loan fund having demonstrated fiduciary integrity,

(ii) includes a description of services or goods to be sold, a marketing plan, and projected financial statements, and

(iii) may require the eligible individual to obtain the assistance of an experienced entrepreneurial advisor.

(I) Qualified principal residence

The term "qualified principal residence" means a principal residence (within the meaning of section 1034 of Title 26), the qualified acquisition costs of which do not exceed 100 percent of the average area purchase price applicable to such residence

(determined in accordance with paragraphs (2) and (3) of section 143(e) of Title 26).

(i) Sanction welfare recipients for failing to ensure that minor dependent children attend school

A State to which a grant is made under section 603 of this title shall not be prohibited from sanctioning a family that includes an adult who has received assistance under any State program funded under this part attributable to funds provided by the Federal Government or under the food stamp program, as defined in section 2012(h) of Title 7, if such adult fails to ensure that the minor dependent children of such adult attend school as required by the law of the State in which the minor children reside.

(J) Requirement for high school diploma or equivalent

A State to which a grant is made under section 603 of this title shall not be prohibited from sanctioning a family that includes an adult who is older than age 20 and younger than age 51 and who has received assistance under any State program funded under this part attributable to funds provided by the Federal Government or under the food stamp program, as defined in section 2012(h) of Title 7, if such adult does not have, or is not working toward attaining, a secondary school diploma or its recognized equivalent unless such adult has been determined in the judgment of medical, psychiatric, or other appropriate professionals to lack the requisite capacity to complete successfully a course of study that would lead to a secondary school diploma or its recognized equivalent.

(k) Limitations on use of grant for matching under certain federal transportation program

(1) Use limitations

A State to which a grant is made under section 603 of this section may not use any part of the grant to match

funds made available under section 3037 of the Transportation Equity Act for the 21st Century, unless-

(A) the grant is used for new or expanded transportation services (and not for construction) that benefit individuals described in subparagraph (C), and not to subsidize current operating costs;

(B) the grant is used to supplement and not supplant other State expenditures on transportation;

(C) the preponderance of the benefits derived from such use of the grant accrues to individuals who are--

(i) recipients of assistance under the State program funded under this part;

(ii) former recipients of such assistance;

(iii) noncustodial parents who are described in section 603(a)(5)(C)(iii) of this title; and

(iv) low-income individuals who are at risk of qualifying for such assistance; and

(D) the services provided through such use of the grant promote the ability of such recipients to engage in work activities (as defined in section 607(d) of this title).

(2) Amount limitation

From a grant made to a State under section 603 (a) of this title, the amount that a State uses to match funds described in paragraph (1) of this subsection shall not exceed the amount (if any) by which 30 percent of the total amount of the grant exceeds the amount (if any) of the grant that is used by the State to carry out any State program described in subsection (d)(1) of this section.

(3) Rule of interpr ion

The provision by a State of a transportation benefit under a program conducted under section 3037 of the Transportation Equity Act for the 21st Century, to an individual who is not otherwise a recipient of assistance under the State program funded under this part, using funds from a grant made under section 603(a) of this title, shall not be considered to be the provision of assistance to the individual under the State program funded under this part.

§ 604a. Services provided charitable, religious, or private organizations

(a) In general

(1) State options

A State may--

(A) administer and provide services under the programs described in subparagraphs (A) and (B)(i) of paragraph (2) through contracts with charitable, religious, or private organizations; and

(B) provide beneficiaries of assistance under the programs described in subparagraphs (A) and (II)(ii) of paragraph (2) with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations.

(2) Programs described

The programs described in this paragraph are the following programs:

(A) A State program funded under part A of title IV of the Social Security Act [42 U.S.C.A. § 601 et seq.] (as amended by section 103(a) of this Act).

(B) Any other program established or modified under title I or II of this Act, that--

(i) permits contracts with organizations; or

(ii) permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance.

(b) Religious organizations

The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2) of this section, on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

(c) Nondiscrimination against religious organizations

In the event a State exercises its authority under subsection (a) of this section, religious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) of this section so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k) of this section, neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

(d) Religious character and freedom

(1) Religious organizations

A religious organization with a contract described in subsection (a)(1)(A) of this section, or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B) of this section, shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

(2) Additional safeguards

Neither the Federal Government nor a State shall require a religious organization to--

(A) alter its form of internal governance; or

(B) remove religious art, icons, scripture, or other symbols;

in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in subsection (a)(2) of this section.

(e) Rights of beneficiaries of assistance

(1) In general

If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2) of this section, the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such

objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

(2) Individual described

An individual described in this paragraph is an individual who receives, applies for, or requests to apply for, assistance under a program described in subsection (a)(2) of this section.

(f) Employment practices

A religious organization's exemption provided under section 2000e-1 of this title regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2) of this section.

(g) Nondiscrimination against beneficiaries

Except as otherwise provided in law, a religious organization shall not discriminate against an individual in regard to rendering assistance funded under any program described in subsection (a)(2) of this section on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.

(h) Fiscal accountability

(1) In general

Except as provided in paragraph (2), any religious organization contracting to provide assistance funded under any program described in subsection (a)(2) of this section shall be subject to the same regulations as other contractors to account in accord

with generally accepted auditing principles for the use of such funds provided under such programs.

(2) Limited audit

If such organization segregates Federal funds provided under such programs into separate accounts, then only the financial assistance provided with such funds shall be subject to audit.

(i) Compliance

Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

(J) Limitations on use of funds for certain purposes

No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) of this section shall be expended for sectarian worship, instruction, or proselytization.

(k) Preemption

Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

§ 605. Administrative provisions

(a) Quarterly

The Secretary shall pay each grant payable to a State under section 603 of this title in quarterly installments, subject to this section.

(b) Notification

Not later than 3 months before the payment of any such quarterly installment to a State, the Secretary shall notify the State of the amount of any reduction determined under section 612(a)(1)(B) of this title with respect to the State.

(c) Computation and certification of payments to States

(1) Computation

The Secretary shall estimate the amount to be paid to each eligible State for each quarter under this part, such estimate to be based on a report filed by the State containing an estimate by the State of the total sum to be expended by the State in the quarter under the State program funded under this part and such other information as the Secretary may find necessary.

(2) Certification

The Secretary of Health and Human Services shall certify to the Secretary of the Treasury the amount estimated under paragraph (1) with respect to a State, reduced or increased to the extent of any overpayment or underpayment which the Secretary of Health and Human Services determines was made under this part to the State for any prior quarter and with respect to which adjustment has not been made under this paragraph.

(d) Payment method

Upon receipt of a certification under subsection (c)(2) of this section with respect to a State, the Secretary of the

Treasury shall, through the Fiscal Service of the Department of the Treasury and before audit or settlement by the General Accounting Office, pay to the State, at the time or times fixed by the Secretary of Health and Human Services, the amount so certified.

§ 606. Federal loans for State welfare Programs

(a) Loan authority

(1) In general

The Secretary shall make loans to any loan-eligible State, for a period to maturity of not more than 3 years.

(2) Loan-eligible State

As used in paragraph (1), the term "loan-eligible State" means a State against which a penalty has not been imposed under section 609(a)(1) of this title.

(b) Rate of interest

The Secretary shall charge and collect interest on any loan made under this section at a rate equal to the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the period to maturity of the loan.

(c) Use of loan

A State shall use a loan made to the State under this section only for any purpose for which grant amounts received by the State under section 603(a) of this title may be used, including--

(1) welfare anti-fraud activities; and

(2) the provision of assistance under the State program to Indian families that have moved from

the service area of an Indian tribe with a tribal family assistance plan approved under section 612 of this title.

(d) Limitation on total amount of loans to a State

The cumulative dollar amount of all loans made to a State under this section during fiscal years 1997 through 2002 shall not exceed 10 percent of the State family assistance grant.

(e) Limitation on total amount of outstanding loans

The total dollar amount of loans outstanding under this section may not exceed $1,700,000,000.

(f) Appropriation

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated such sums as may be necessary for the cost of loans under this section.

607. Mandatory work requirements

(a) Participation rate requirements

(1) All families

A State to which a grant is made under section 603 of this title for a fiscal year shall achieve the minimum participation rate specified in the following table for the fiscal year with respect to all families receiving assistance under the State program funded under this part:

If the fiscal year is:	The minimum participation rate is:
1997	25
1998	30
1999	35

2000 40
2001.....45
2002 or thereafter.....50.

(2) 2-parent families

A State to which a grant is made under section 603 of this title for a fiscal year shall achieve the minimum participation rate specified in the following table for the fiscal year with respect to 2-parent families receiving assistance under the State program funded under this part:

If the fiscal year is:	The minimum participation rate is:
1997	75
1998	75
1999 or thereafter	90.

(b) Calculation of participation rates

(1) All families

(A) Average monthly rate

For purposes of subsection (a)(1) of this section, the participation rate or all families of a State for a fiscal year is the average of the participation rates for all families of the State for each month in the fiscal year.

(B) Monthly participation rates

The participation rate of a State for all families of the State for a month, expressed as a percentage, is-

(i) the number of families receiving assistance under the State program funded under this part that include an

adult or a minor child head of household who is engaged in work for the month; divided by

(ii) the amount by which--

(I) number of families receiving such assistance during the month that include an adult or a minor child head of household receiving such assistance; exceeds

(II) the number of families receiving such assistance that are subject in such month to a penalty described in subsection (e)(1) of this section but have not been subject to such penalty for more than 3 months within the preceding 12-month period (whether or not consecutive).

(2) 2-parent families

(A) Average monthly rate

For purposes of subsection (a)(2) of this section, the participation rate for 2-parent families of a State for a fiscal year is the average of the participation rates for 2-parent families of the State for each month in the fiscal year.

(B) Monthly participation rates

The participation rate of a State for 2-parent families of the State for a month shall be calculated by use of the formula set forth in paragraph (1)(B), except that in the formula the term "number of 2-parent families" shall be substituted for the term "number of families" each place such latter term appears.

(C) Family with a disabled parent not treated as a 2-parent family

A family that includes a disabled parent shall not be considered a 2-parent family for purposes of subsections (a) and (b) of this section.

(3) Pro rata reduction of participation rate due to caseload reductions not required by Federal law and not resulting from changes in State eligibility criteria

(A) In general

The Secretary shall prescribe regulations for reducing the minimum participation rate otherwise required by this section for a fiscal year by the number of percentage points equal to the number of percentage points (if any) by which--

(i) the average monthly number of families receiving assistance during the immediately preceding fiscal year under the State program funded under this part is less than

(ii) the average monthly number of families that received aid under the State plan approved under part A (as in effect on September 30, 1995) during fiscal year 1995.

The minimum participation rate shall not be reduced to the extent that the Secretary determines that the reduction in the number of families receiving such assistance is required by Federal law.

(B) Eligibility changes not counted

The regulations required by subparagraph (A) shall not take into account families that are diverted from a State program funded under this part as a result of differences in eligibility criteria under a State program funded under this part and eligibility criteria under the State program

operated under the State plan approved under part A (as such plan and such part were in effect on September 30, 1995). Such regulations shall place the burden on the Secretary to prove that such families were diverted as a direct result of differences in such eligibility criteria.

(4) State option to include individuals receiving assistance under a tribal family assistance plan or tribal work program

For purposes of paragraphs (1)(B) and (2)(B), a State may, at its option, include families in the State that are receiving assistance under a tribal family assistance plan approved under section 612 of this title or under a tribal work program to which funds are provided under this part.

(5) State option for participation requirement exemptions

For any fiscal year, a State may, at its option, not require an individual who is a single custodial parent caring for a child who has not attained 12 months of age to engage in work, and may disregard such an individual in determining the participation rates under subsection (a) of this section for not more than 12 months.

(c) Engaged in work

(1) General rules

(A) All families

For purposes of subsection (b)(1)(B)(i) of this section, a recipient is engaged in work for a month in a fiscal year if the recipient is participating in work activities for at least the minimum average number of hours per week specified in the following table during the month, not fewer than 20 hours per week of which are attributable to an activity described in paragraph (1), (2), (3), (4), (5), (6), (7), (8), or (12) of subsection (d) of this section, subject to this subsection:

If the month is in fiscal year:	The minimum average number of hours per week is:
1997	20
1998	20
1999	20
2000 or thereafter	30.

(B) 2-parent families

For purposes of subsection (b)(2)(B) of this section, an individual is engaged in work for a month in a fiscal year if--

(i) the individual and the other parent in the family are participating in work activities for a total of at least 35 hours per week during the month, not fewer than 30 hours per week of which are attributable to an activity described in paragraph (1), (2), (3), (4), (5), (6), (7), (8), or (12) of subsection (d) of this section, subject to this subsection; and

(ii) if the family of the individual receives federally-funded child care assistance and an adult in the family is not disabled or caring for a severely disabled child, the individual and the other parent in the family are participating in work activities for a total of at least 55 hours per week during the month, not fewer than 50 hours per week of which are attributable to an activity described in paragraph (1), (2), (3), (4), (5), (6), (7), (8), or (12) of subsection (d) of this section.

(2) Limitations and special rules

(A) Number of weeks for which job search counts as work

(i) Limitation

Notwithstanding paragraph (1) of this subsection, an individual shall not be considered to be engaged in work by virtue of participation in an activity described in subsection (d)(6) of this section of a State program funded under this part, after the individual has participated in such an activity for 6 weeks (or, if the unemployment rate of the State is at least 50 percent greater than the unemployment rate of the United States or the State is a needy State (within the meaning of section 603(b)(6) of this title), 12 weeks), or if the participation is for a week that immediately follows 4 consecutive weeks of such participation.

(ii) Limited authority to count less than full week of participation

For purposes of clause (i) of this subparagraph, on not more than 1 occasion per individual, the State shall consider participation of the individual in an activity described in subsection (d)(6) of this section for 3 or 4 days during a week as a week of participation in the activity by the individual.

(B) Single parent or relative with child under age 6 deemed to be meeting work participation requirements if parent or relative is engaged in work for 20 hours per week

For purposes of determining monthly participation rates under subsection (b)(1)(B)(i) of this section,

a recipient who is the only parent or caretaker relative in the family of a child who has not attained 6 years of age is deemed to be engaged in work for a month if the recipient is engaged in work for an average of at least 20 hours per week during the month.

(C) Single teen head of household or married teen who maintains satisfactory school attendance deemed to be meeting work participation requirements

For purposes of determining monthly participation rates under subsection (b)(1)(B)(i) of this section, a recipient who is married or a head of household and has not attained 20 years of age is deemed to be engaged in work for a month in a fiscal year if the recipient--

(i) maintains satisfactory attendance at secondary school or the equivalent during the month; or

(ii) participates in education directly related to employment for an average of at least 20 hours per week during the month.

(D) Limitation on number of persons who may be treated as engaged in work by reason of participation in educational activities

For purposes of determining monthly participation rates under paragraphs (1)(B)(i) and (2)(B) of subsection (b) of this section, not more than 30 percent of the number of individuals in all families and in 2-parent families, respectively, in a State who are treated as engaged in work for a month may consist of individuals who are determined to be engaged in work for the month by reason of participation in vocational educational training, or (if the month is in fiscal year 2000 or thereafter)

deemed to be engaged in work for the month by reason of subparagraph (C) of this paragraph.

(d) "Work activities" defined

As used in this section, the term "work activities" means--

(1) unsubsidized employment;

(2) subsidized private sector employment;

(3) subsidized public sector employment;

(4) work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available;

(5) on-the-job training;

(6) job search and job readiness assistance;

(7) community service programs;

(8) vocational educational training (not to exceed 12 months with respect to any individual);

(9) job skills training directly related to employment;

(10) education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency;

(11) satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate; and

(12) the provision of child care services to an individual who is participating in a community service program.

(e) Penalties against individuals

(1) In general

Except as provided in paragraph (2), if an individual in a family receiving assistance under the State program funded under this part refuses to engage in work required in accordance with this section, the State shall--

(A) reduce the amount of assistance otherwise payable to the family pro rata (or more, at the option of the State) with respect to any period during a month in which the individual so refuses; or

(B) terminate such assistance,

subject to such good cause and other exceptions as the State may establish.

(2) Exception

Notwithstanding paragraph (1), a State may not reduce or terminate assistance under the State program funded under this part based on a refusal of an individual to engage in work required in accordance with this section if the individual is a single custodial parent caring for a child who has not attained 6 years of age, and the individual proves that the individual has a demonstrated inability (as determined by the State) to obtain needed child care, for 1 or more of the following reasons:

(A) Unavailability of appropriate child care within a reasonable distance from the individual's home or work site.

(B) Unavailability or unsuitability of informal child care by a relative or under other arrangements.

(C) Unavailability of appropriate and affordable formal child care arrangements.

(f) Nondisplacement in work activities

(1) In general

Subject to paragraph (2), an adult in a family receiving assistance under a State program funded under this part attributable to funds provided by the Federal Government may fill a vacant employment position in order to engage in a work activity described in subsection (d) of this section.

(2) No filling of certain vacancies

No adult in a work activity described in subsection (d) of this section which is funded, in whole or in part, by funds provided by the Federal Government shall be employed or assigned--

(A) when any other individual is on layoff from the same or any substantially equivalent job; or

(B) if the employer has terminated the employment of any regular employee or otherwise caused an involuntary reduction of its workforce in order to fill the vacancy so created with an adult described in paragraph (1).

(3) Grievance procedure

A State with a program funded under this part shall establish and maintain a grievance procedure for

resolving complaints of alleged violations of paragraph (2).

(4) No preemption

Nothing in this subsection shall preempt or supersede any provision of State or local law that provides greater protection for employees from displacement.

(g) Sense of the Congress

It is the sense of the Congress that in complying with this section, each State that operates a program funded under this part is encouraged to assign the highest priority to requiring adults in 2-parent families and adults in single-parent families that include older preschool or school-age children to be engaged in work activities.

(h) Sense of the Congress that States should impose certain requirements on noncustodial, nonsupporting minor parents

It is the sense of the Congress that the States should require noncustodial, nonsupporting parents who have not attained 18 years of age to fulfill community work obligations and attend appropriate parenting or money management classes after school.

(i) Review of implementation of State work programs

During fiscal year 1999, the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate shall hold hearings and engage in other appropriate activities to review the implementation of this section by the States, and shall invite the Governors of the States to testify before them regarding such implementation.

Based on such hearings, such Committees may introduce such legislation as may be appropriate to remedy any problems with the State programs operated pursuant to this section.

§ 608. Prohibitions, requirements

(a) In general

(1) No assistance for families without a minor child

A State to which a grant is made under section 603 of this title shall not use any part of the grant to provide assistance to a family, unless the family includes a minor child who resides with the family (consistent with paragraph (10)) or a pregnant individual.

(2) Reduction or elimination of assistance for noncooperation in establishing paternity or obtaining child support

If the agency responsible for administering the State plan approved under part D of this subchapter determines that an individual is not cooperating with the State in establishing patemity or in establishing, modifying, or enforcing a support order with respect to a child of the individual, and the individual does not qualify for any good cause or other exception established by the State pursuant to section 654(29) of this title, then the State--

(A) shall deduct from the assistance that would otherwise be provided to the family of the individual under the State program funded under this part an amount equal to not less than 25 percent of the amount of such assistance; and

(B) may deny the family any assistance under the State program.

(3) No assistance for families not assigning certain support rights to the State

(A) In general

A State to which a grant is made under section 603 of this title shall require, as a condition of providing assistance to a family under the State program funded under this part, that a member of the family assign to the State any rights the family member may have (on behalf of the family member or of any other person for whom the family member has applied for or is receiving such assistance) to support from any other person, not exceeding the total amount of assistance so provided to the family, which accrue (or have accrued) before the date the family ceases to receive assistance under the program, which assignment, on and after such date, shall not apply with respect to any support (other than support collected pursuant to section 664 of this title) which accrued before the family received such assistance and which the State has not collected by--

(i) (I) September 30, 2000, if the assignment is executed on or after October 1, 1997, and before October 1, 2000; or

(II) the date the family ceases to receive assistance under the program, if the assignment is executed on or after October 1, 2000; or

(ii) if the State elects to distribute collections under section 657(a)(6) of this title, the date the family ceases to receive assistance under the program, if the assignment is executed on or after October 1, 1998.

(B) Limitation

A State to which a grant is made under section 603 of this title shall not require, as a condition of providing assistance to any family under the State program funded under this part, that a member of the family assign to the State any rights to support described in subparagraph (A) which accrue after the date the family ceases to receive assistance under the program.

(4) No assistance for teenage parents who do not attend high school or other equivalent training program

A State to which a grant is made under section 603 of this title shall not use any part of the grant to provide assistance to an individual who has not attained 18 years of age, is not married, has a minor child at least 12 weeks of age in his or her care, and has not successfully completed a high-school education (or its equivalent), if the individual does not participate in--

(A) educational activities directed toward the attainment of a high school diploma or its equivalent; or

(B) an alternative educational or training program that has been approved by the State.

(5) No assistance for teenage parents not living in adult-supervised settings

(A) In general

(i) Requirement

Except as provided in subparagraph (B), a State to which a grant is made under section 603 of this title shall not use any part of the grant to provide assistance to an individual described in clause (ii) of this subparagraph if the individual and the minor child referred to in clause

(ii)(II) do not reside in a place of residence maintained by a parent, legal guardian; or other adult relative of the individual as such parent's, guardian's, or adult relative's own home.

(ii) Individual described

For purposes of clause (i), an individual described in this clause is an individual who--

(I) has not attained 18 years of age; and

(II) is not married, and has a minor child in his or her care.

(B) Exception

(i) Provision of, or assistance in locating, adult-supervised living arrangement

In the case of an individual who is described in clause (ii), the State agency referred to in section 602(a)(4) of this title shall provide, or assist the individual in locating, a second chance home, maternity home, or other appropriate adult-supervised supportive living arrangement, taking into consideration the needs and concerns of the individual, unless the State agency determines that the individual's current living arrangement is appropriate, and thereafter shall require that the individual and the minor child referred to in subparagraph (A)(ii)(II) reside in such living arrangement as a condition of the continued receipt of assistance under the State program funded under this part

attributable to funds provided by the Federal Government (or in an alternative appropriate arrangement, should circumstances change and the current arrangement cease to be appropriate).

(ii) Individual described

For purposes of clause (i), an individual is described in this clause if the individual is described in subparagraph (A)(ii), and--

(I) the individual has no parent, legal guardian, or other appropriate adult relative described in subclause (II) of his or her own who is living or whose whereabouts are known;

(II) no living parent, legal guardian, or other appropriate adult relative, who would otherwise meet applicable State criteria to act as the individual's legal guardian, of such individual allows the individual to live in the home of such parent, guardian, or relative;

(III) the State agency determines that--

(aa) the individual or the minor child referred to in subparagraph (A)(ii)(II) is being or has been subjected to serious physical or emotional harm, sexual abuse, or exploitation in the residence of the individual's own parent or legal guardian; or

(bb) substantial evidence exists of an act or failure to act that presents an imminent or serious harm if the individual and the minor child lived

in the same residence with the individual's own parent or legal guardian; or

(IV) the State agency otherwise determines that it is in the best interest of the minor child to waive the requirement of subparagraph (A) with respect to the individual or the minor child.

(iii) Second-chance home

For purposes of this subparagraph, the term "second-chance home" means an entity that provides individuals described in clause (ii) with a supportive and supervised living arrangement in which such individuals are required to learn parenting skills, including child development, family budgeting, health and nutrition, and other skills to promote their long-term economic independence and the well-being of their children.

(6) No medical services

(A) In general

A State to which a grant is made under section 603 of this title shall not use any part of the grant to provide medical services.

(B) Exception for prepregnancy family planning services

As used in subparagraph (A), the term "medical services" does not include prepregnancy family planning services.

(7) No assistance for more than 5 years

(A) In general

A State to which a grant is made under section 603 of this title shall not use any part of the grant to provide assistance to a family that includes an adult who has received assistance under any State program funded under this part attributable to funds provided by the Federal Government, for 60 months (whether or not consecutive) after the date the State program funded under this part commences, subject to this paragraph.

(B) Minor child exception

In determining the number of months for which an individual who is a parent or pregnant has received assistance under the State program funded under this part, the State shall disregard any month for which such assistance was provided with respect to the individual and during which the individual was--

(i) a minor child; and

(ii) not the head of a household or married to the head of a household.

(C) Hardship exception

(i) In general

The State may exempt a family from the application of subparagraph (A) by reason of hardship or if the family includes an individual who has been battered or subjected to extreme cruelty.

(ii) Limitation

The average monthly number of families with respect to which an exemption made by a State under clause (i) is in effect for a fiscal year shall not exceed 20 percent of the average monthly number of

families to which assistance is provided under the State program funded under this part during the fiscal year or the immediately preceding fiscal year (but not both), as the State may elect.

(iii) Battered or subject to extreme cruelty defined

For purposes of clause (i), an individual has been battered or subjected to extreme cruelty if the individual has been subjected to--

(I) physical acts that resulted in, or threatened to result in, physical injury to the individual;

(II) sexual abuse;

(III) sexual activity involving a dependent child;

(IV) being forced as the caretaker relative of a dependent child to engage in nonconsensual sexual acts or activities;

(V) threats of, or attempts at, physical or sexual abuse;

(VI) mental abuse; or

(VII) neglect or deprivation of medical care.

(D) Disregard of months of assistance received by adult while living in Indian country or an Alaskan Native village with 50 percent unemployment

(i) In general

In determining the number of months for which an adult has received assistance under a State or tribal program funded under this part, the State or tribe shall disregard any month during which the adult lived in Indian country or an Alaskan Native village if the most reliable data available with respect to the month (or a period including the month) indicate that at least 50 percent of the adults living in Indian country or in the village were not employed.

(ii) "Indian country" defined

As used in clause (i), the term "Indian country" has the meaning given such term in section 1151 of Title 18.

(E) Rule of interpretation

Subparagraph (A) shall not be interpreted to require any State to provide assistance to any individual for any period of time under the State program funded under this part.

(F) Rule of interpretation

This part shall not be interpreted to prohibit any State from expending State funds not originating with the Federal Government on benefits for children or families that have become ineligible for assistance under the State program funded under this part by reason of subparagraph (A).

(G) Inapplicability to welfare-to-work grants and assistance

For purposes of subparagraph (A) of this paragraph, a grant made under section 603(a)(5) of this title shall not be considered a grant made under section 603 of this title, and noncash

assistance from funds provided under section 603(a)(5) of this title shall not be considered assistance.

(8) Denial of assistance for 10 years to a person found to have fraudulently misrepresented residence in order to obtain assistance in 2 or more States

A State to which a grant is made under section 603 of this title shall not use any part of the grant to provide cash assistance to an individual during the 10-year period that begins on the date the individual is convicted in Federal or State court of having made a fraudulent statement or representation with respect to the place of residence of the individual in order to receive assistance simultaneously from 2 or more States under programs that are funded under this subchapter, subchapter XIX of this chapter, or the Food Stamp Act of 1977 [7 U.S.C.A. & 2011 et seq.], or benefits in 2 or more States under the supplemental security income program under subchapter XVI of this chapter. The preceding sentence shall not apply with respect to a conviction of an individual, for any month beginning after the President of the United States grants a pardon with respect to the conduct which was the subject of the conviction.

(9) Denial of assistance for fugitive felons and probation and parole violators

(A) In general

A State to which a grant is made under section 603 of this title shall not use any part of the grant to provide assistance to any individual who is-

(i) fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the individual flees, for a crime, or an

attempt to commit a crime, which is a felony under the laws of the place from which the individual flees, or which, in the case of the State of New Jersey, is a high misdemeanor under the laws of such State; or

(ii) violating a condition of probation or parole imposed under Federal or State law.

The preceding sentence shall not apply with respect to conduct of an individual, for any month beginning after the President of the United States grants a pardon with respect to the conduct.

(B) Exchange of information with law enforcement agencies

If a State to which a grant is made under section 603 of this title establishes safeguards against the use or disclosure of information about applicants or recipients of assistance under the State program funded under this part, the safeguards shall not prevent the State agency administering the program from furnishing a Federal, State, or local law enforcement officer, upon the request of the officer, with the current address of any recipient if the officer furnishes the agency with the name of the recipient and notifies the agency that--

(i) the recipient--

(I) is described in subparagraph (A); or

(II) has information that is necessary for the officer to conduct the official duties of the officer; and

(ii) the location or apprehension of the recipient is within such official duties.

(10) Denial of assistance for minor children who are absent from the home for a significant period

(A) In general

A State to which a grant is made under section 603 of this title shall not use any part of the grant to provide assistance for a minor child who has been, or is expected by a parent (or other caretaker relative) of the child to be, absent from the home for a period of 45 consecutive days or, at the option of the State, such period of not less than 30 and not more than 180 consecutive days as the State may provide for in the State plan submitted pursuant to section 602 of this title.

(B) State authority to establish good cause exceptions

The State may establish such good cause exceptions to subparagraph (A) as the State considers appropriate if such exceptions are provided for in the State plan submitted pursuant to section 602 of this title.

(C) Denial of assistance for relative who fails to notify State agency of absence of child

A State to which a grant is made under section 603 of this title shall not use any part of the grant to provide assistance for an individual who is a parent (or other caretaker relative) of a minor child and who fails to notify the agency administering the State program funded under this part of the absence of the minor child from the home for the period specified in or provided for pursuant to subparagraph (A), by the end of the 5-day period that begins with the date that it becomes clear to the parent (or relative) that the minor child will be absent for such period so specified or provided for.

(11) Medical assistance required to be provided for certain families having earnings from employment or child support

(A) Earnings from employment

A State to which a grant is made under section 603 of this title and which has a State plan approved under subchapter XIX of this chapter shall provide that in the case of a family that is treated (under section 1396u-1(b)(1)(A) of this title for purposes of subchapter XIX of this chapter) as receiving aid under a State plan approved under this part (as in effect on July 16, 1996), that would become ineligible for such aid because of hours of or income from employment of the caretaker relative (as defined under this part as in effect on such date) or because of section 602(a)(8)(B)(ii)(1I) of this title (as so in effect), and that was so treated as receiving such aid in at least 3 of the 6 months immediately preceding the month in which such ineligibility begins, the family shall remain eligible for medical assistance under the State's plan approved under subchapter XIX of this chapter for an extended period or periods as provided in section 1396r-6 or 1396a(e)(1) of this title (as applicable), and that the family will be appropriately notified of such extension as required by section 1396r-6(a)(2) of this title.

(B) Child support

A State to which a grant is made under section 603 of this title and which has a State plan approved under subchapter XIX of this chapter shall provide that in the case of a family that is treated (under section 1396u-1(b)(1)(A) of this title for purposes of subchapter XIX of this chapter) as receiving aid under a State plan approved under this part (as in effect on July 16, 1996), that would become ineligible for such aid as a result (wholly or partly) of the collection of child or spousal support under part D of this

subchapter and that was so treated as receiving such aid in at least 3 of the 6 months immediately preceding the month in which such ineligibility begins, the family shall remain eligible for medical assistance under the State's plan approved under subchapter XIX of this chapter for an extended period or periods as provided in section 1396u-1(c)(1) of this title.

(b) Individual responsibility plans

(1) Assessment

The State agency responsible for administering the State program funded under this part shall make an initial assessment of the skills, prior work experience, and employability of each recipient of assistance under the program who--

(A) has attained 18 years of age; or

(B) has not completed high school or obtained a certificate of high school equivalency, and is not attending secondary school.

(2) Contents of plans

(A) In general

On the basis of the assessment made under subsection (a) of this section with respect to an individual, the State agency, in consultation with the individual, may develop an individual responsibility plan for the individual, which-

(i) sets forth an employment goal for the individual and a plan for moving the individual immediately into private sector employment;

(ii) sets forth the obligations of the individual, which may include a

requirement that the individual attend school, maintain certain grades and attendance, keep school age children of the individual in school, immunize children, attend parenting and money management classes, or do other things that will help the individual become and remain employed in the private sector;

(iii) to the greatest extent possible is designed to move the individual into whatever private sector employment the individual is capable of handling as quickly as possible, and to increase the responsibility and amount of work the individual is to handle over time;

(iv) describes the services the State will provide the individual so that the individual will be able to obtain and keep employment in the private sector, and describe the job counseling and other services that will be provided by the State; and

(v) may require the individual to undergo appropriate substance abuse treatment.

(B) Timing

The State agency may comply with paragraph (1) with respect to an individual

(i) within 90 days (or, at the option of the State, 180 days) after July 1, 1997, in the case of an individual who, as of July 1, 1997, is a recipient of aid under the State plan approved under part A (as in effect

immediately before July 1, 1997); or

(ii) within 30-days (or, at the option of the State, 90 days) after the individual is determined to be eligible for such assistance, in the case of any other individual.

(3) Penalty for noncompliance by individual

In addition to any other penalties required under the State program funded under this part, the State may reduce, by such amount as the State considers appropriate, the amount of assistance otherwise payable under the State program to a family that includes an individual who fails without good cause to comply with an individual responsibility plan signed by the individual.

(4) State discretion

The exercise of the authority of this subsection shall be within the sole discretion of the State.

(c) Sanctions against recipients not considered wage reductions

A penalty imposed by a State against the family of an individual by reason of the failure of the individual to comply with a requirement under the State program funded under this part shall not be construed to be a reduction in any wage paid to the individual.

(d) Nondiscrimination provisions

The following provisions of law shall apply to any program or activity which receives funds provided under this part:

(1) The Age Discrimination Act of 1975 (42 U.S.C. 6101, et seq.).

(2) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).

(3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12 101 et seq.).

(4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).

(e) Special rules relating to treatment of certain aliens

For special rules relating to the treatment of certain aliens, see title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(f) Special rules relating to the treatment of non-213A aliens

The following rules shall apply if a State elects to take the income or resources of any sponsor of a non-213A alien into account in determining whether the alien is eligible for assistance under the State program funded under this part, or in determining the amount or types of such assistance to be provided to the alien:

(1) Deeming of sponsor's income and resources

For a period of 3 years after a non-213A alien enters the United States:

(A) Income deeming rule

The income of any sponsor of the alien and of any spouse of the sponsor is deemed to be income of the alien, to the extent that the total amount of the income exceeds the sum of-

(i) the lesser of-

(I) 20 percent of the total of any amounts received by the sponsor or any

such spouse in the month as wages or salary or as net earnings from selfemployment, plus the full amount of any costs incurred by the sponsor and any such spouse in producing self-employment income in such month; or

(II) $175;

(ii) the cash needs standard established by the State for purposes of determining eligibility for assistance under the State program funded under this part for a family of the same size and composition as the sponsor and any other individuals living in the same household as the sponsor who are claimed by the sponsor as dependents for purposes of determining the sponsor's Federal personal income tax liability but whose needs are not taken into account in determining whether the sponsor's family has met the cash needs standard;

(iii) any amounts paid by the sponsor or any such spouse to individuals not living in the household who are claimed by the sponsor as dependents for purposes of determining the sponsor's Federal personal income tax liability; and

(iv) any payments of alimony or child support with respect to individuals not living in the household.

(B) Resource deeming rule

The resources of a sponsor of the alien and of any spouse of the sponsor are deemed to be resources of the alien to the extent that the aggregate value of the resources exceeds $1,500.

(C) Sponsors of multiple non-213A aliens

If a person is a sponsor of 2 or more non-213A aliens who are living in the same home, the income and resources of the sponsor and any spouse of the sponsor that would be deemed income and resources of any such alien under subparagraph (A) shall be divided into a number of equal shares equal to the number of such aliens, and the State shall deem the income and resources of each such alien to include 1 such share.

(2) Ineligibility of non-213A aliens sponsored by agencies; exception

A non-213A alien whose sponsor is or was a public or private agency shall be ineligible for assistance under a State program funded under this part, during a period of 3 years after the alien enters the United States, unless the State agency administering the program determines that the sponsor either no longer exists or has become unable to meet the alien's needs.

(3) Information provisions

(A) Duties of non-213A aliens

A non-213A alien, as a condition of eligibility for assistance under a State program funded under this part during the period of 3 years after the alien enters the United States, shall be required to provide to the State agency administering the program-

(i) such information and documentation with respect to the alien's sponsor as may be necessary in order for the State agency to make any determination required under this subsection, and to obtain any cooperation from the sponsor necessary for any such determination; and

(ii) such information and documentation as the State agency may request and which the alien or the alien's sponsor provided in support of the alien's immigration application.

(B) Duties of Federal agencies

The Secretary shall enter into agreements with the Secretary of State and the Attorney General under which any information available to them and required in order to make any determination under this subsection will be provided by them to the Secretary (who may, in turn, make the information available, upon request, to a concerned State agency).

(4) "Non-213A alien" defined

An alien is a non-213A alien for purposes of this subsection if the affidavit of support or similar agreement with respect to the alien that was executed by the sponsor of the alien's entry into the United States was executed other than pursuant to section 213A of the Immigration and Nationality Act (section 1183A of Title 8].

(5) Inapplicability to alien minor sponsored by a parent

This subsection shall not apply to an alien who is a minor child if the sponsor of the alien or any spouse of the sponsor is a parent of the alien.

(6) Inapplicability to certain categories of aliens This subsection shall not apply to an alien who is

(A) admitted to the United States as a refugee under section 1157 of Title 8;

(B) paroled into the United States under section 1182(d)(5) of Title 8 for a period of at least 1 year; or

(C) granted political asylum by the Attorney General under section 1158 of Title 8.

(g) State required to provide certain information

Each State to which a grant is made under section 603 of this title shall, at least 4 times annually and upon request of the Immigration and Naturalization Service, furnish the Immigration and Naturalization Service with the name and address of, and other identifying information on, any individual who the State knows is not lawfully present in the United States.

§ 608a. Fraud under means-tested welfare and Public assistance programs

(a) In general

If an individual's benefits under a Federal, State, or local law relating to a means-tested welfare or a public assistance program are reduced because of an act of fraud by the individual under the law or program, the individual may not, for the duration of the reduction, receive an increased benefit under any other means-tested welfare or public assistance program for which Federal funds are appropriated as a result of a decrease in the income of the individual (determined under the applicable program) attributable to such reduction.

(b) Welfare or public assistance programs for which Federal funds are appropriated

For purposes of subsection (a) of this section, the term "means-tested welfare or public assistance program for which Federal funds are appropriated" includes the food stamp program under the Food Stamp Act of 1977 L U.S.C. 2011 et seq.), any program of public or assisted housing

under title I of the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.), and any State program funded under part A of title IV of the Social Security Act (42 U.S.C. 601 et seq.).

§ 609. Penalties

(a) In general

Subject to this section:

(1) Use of grant in violation of this part

(A) General penalty

If an audit conducted under chapter 75 of Title 31 finds that an amount paid to a State under section 603 of this title for a fiscal year has been used in violation of this part, the Secretary shall reduce the grant payable to the State under section 603(a)(1) of this title for the immediately succeeding fiscal year quarter by the amount so used.

(B) Enhanced penalty for intentional violations

If the State does not prove to the satisfaction of the Secretary that the State did not intend to use the amount in violation of this part, the Secretary shall further reduce the grant payable to the State under section 603(a)(1) of this title for the immediately succeeding fiscal year quarter by an amount equal to 5 percent of the State family assistance grant.

(C) Penalty for misuse of competitive welfare-to-work funds

If the Secretary of Labor finds that an amount paid to an entity under section 603(a)(5)(B) of this title has been used in violation of subparagraph (B) or (C) of section 603(a)(5) of this title, the entity

shall remit to the Secretary of Labor an amount equal to the amount so used.

(2) Failure to submit required report

(A) In general

If the Secretary determines that a State has not, within 45 days after the end of a fiscal quarter, submitted the report required by section 611 (a) of this title for the quarter, the Secretary shall reduce the grant payable to the State under section 603(a)(1) of this title for the immediately succeeding fiscal year by an amount equal to 4 percent of the State family assistance grant.

(B) Rescission of penalty

The Secretary shall rescind a penalty imposed on a State under subparagraph (A) with respect to a report if the State submits the report before the end of the fiscal quarter that immediately succeeds the fiscal quarter for which the report was required.

(3) Failure to satisfy minimum participation rates

(A) In general

If the Secretary determines that a State to which a grant is made under section 603 of this title for a fiscal year has failed to comply with section 607 (a) of this title for the fiscal year, the Secretary shall reduce the grant payable to the State under section 603(a)(1) of this title for the immediately succeeding fiscal year by an amount equal to the applicable percentage of the State family assistance grant.

(B) "Applicable percentage" defined

As used in subparagraph (A), the term "applicable percentage" means, with respect to a State

(i) if a penalty was not imposed on the State under subparagraph (A) for the immediately preceding fiscal year, 5 percent; or

(ii) if a penalty was imposed on the State under subparagraph (A) for the immediately preceding fiscal year, the lesser of-

(I) the percentage by which the grant payable to the State under section 603(a)(1) of this title was reduced for such preceding fiscal year, increased by 2 percentage points; or

(II) 21 percent.

(C) Penalty based on severity of failure

The Secretary shall impose reductions under subparagraph (A) with respect to a fiscal year based on the degree of noncompliance, and may reduce the penalty if the noncompliance is due to circumstances that caused the State to become a needy State (as defined in section 603(b)(6) of this title) during the fiscal year or if the noncompliance is due to extraordinary circumstances such as a natural disaster or regional recession. The Secretary shall provide a written report to Congress to justify any waiver or penalty reduction due to such extraordinary circumstances.

(4) Failure to participate in the income and eligibility verification system

If the Secretary determines that a State program funded under this part is not participating during a fiscal year in the income and eligibility verification system required by section 1320b-7 of this title, the Secretary shall reduce the grant payable to the State under section 603(a)(1) of this title for the immediately succeeding

fiscal year by an amount equal to not more than 2 percent of the State family assistance grant.

(5) Failure to comply with paternity establishment and child support enforcement requirements under part D of this subchapter

Notwithstanding any other provision of this chapter, if the Secretary determines that the State agency that administers a program funded under this part does not enforce the penalties requested by the agency administering part D of this subchapter against recipients of assistance under the State program who fail to cooperate in establishing paternity or in establishing, modifying, or enforcing a child support order in accordance with such part and who do not qualify for any good cause or other exception established by the State under section 654(29) of this title, the Secretary shall reduce the grant payable to the State under section 603(a)(1) of this title for the immediately succeeding fiscal year (without regard to this section) by not more than 5 percent.

(6) Failure to timely repay a Federal loan fund for State welfare programs

If the Secretary determines that a State has failed to repay any amount borrowed from the Federal Loan Fund for State Welfare Programs established under section 606 of this title within the period of maturity applicable to the loan, plus any interest owed on the loan, the Secretary shall reduce the grant payable to the State under section 603(a)(1) of this title for the immediately succeeding fiscal year quarter (without regard to this section) by the outstanding loan amount, plus the interest owed on the outstanding amount. The Secretary shall not forgive any outstanding loan amount or interest owed on the outstanding amount.

(7) Failure of any State to maintain certain level of historic effort

(A) In general

The Secretary shall reduce the grant payable to the State under section 603(a)(1) of this title for fiscal year 1998, 1999, 2000, 2001, 2002, or 2003 by the amount (if any) by which qualified State expenditures for the then immediately preceding fiscal year are less than the applicable percentage of historic State expenditures with respect to such preceding fiscal year.

(B) Definitions

As used in this paragraph:

(i) Qualified State expenditures

(I) In general

The term "qualified State expenditures" means, with respect to a State and a fiscal year, the total expenditures by the State during the fiscal year, under all State programs, for any of the following with respect to eligible families:

(aa) Cash assistance, including any amount collected by the State as support pursuant to a plan approved under part D of this subchapter, on behalf of a family receiving assistance under the State program funded under this part, that is distributed to the family under section 657(a)(1)(B) of this title and disregarded in determining the eligibility of the family for, and the amount of, such assistance.

(bb) Child care assistance.

(cc) Educational activities designed to increase self-sufficiency, job training, and work, excluding any expenditure for public education in

the State except expenditures which involve the provision of services or assistance to a member of an eligible family which is not generally available to persons who are not members of an eligible family.

(dd) Administrative costs in connection with the matters described in items (aa), (bb), (cc), and (ee), but only to the extent that such costs do not exceed 15 percent of the total amount of qualified State expenditures for the fiscal year.

(ee) Any other use of funds allowable under section 604(a)(1) of this title.

(II) Exclusion of transfers from other State and local programs

Such term does not include expenditures under any State or local program during a fiscal year, except to the extent that

(aa) the expenditures exceed the amount expended under the State or local program in the fiscal year most recently ending before August 22, 1996; or

(bb) the State is entitled to a payment under former section 603 of this title (as in effect immediately before August 22, 1996) with respect to the expenditures.

(III) Exclusion of amounts expended to replace penalty grant reductions

Such term does not include any amount expended in order to comply with paragraph (12).

(IV) Eligible families

As used in subclause (1), the term "eligible families" means families eligible for assistance under the State program funded under this part, families that would be eligible for such assistance but for the application of section 608(a)(7) of this title, and families of aliens lawfully present in the United States that would be eligible for such assistance but for the application of title N of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(ii) Applicable percentage

The term "applicable percentage" means for fiscal years 1997 through 2002, 80 percent

(or, if the State meets the requirements of section 607(a) of this title for the fiscal year, 75 percent).

(iii) Historic State expenditures

The term "historic State expenditures" means, with respect to a State, the lesser of --

(I) the expenditures by the State under this part and part F of this subchapter (as in effect during fiscal year 1994) for fiscal year 1994; or

(II) the amount which bears the same ratio to the amount described in subclause (1) as --

(aa) the State family assistance grant, plus the total amount required to be paid to the State under former section 603 of this title for fiscal year 1994 with respect to amounts expended by the State for child care under subsection (g) or (i) of section 602 of this title (as in effect during fiscal year 1994); bears to

(bb) the total amount required to be paid to the State under former section 603 of this title (as in effect during fiscal year 1994) for fiscal year 1994.

Such term does not include any expenditures under the State plan approved under this part (as so in effect) on behalf of individuals covered by a tribal family assistance plan approved under section 612 of this title, as determined by the Secretary.

(iv) Expenditures by the State

The term "expenditures by the State" does not include-

(I) any expenditure from amounts made available by the Federal Government;

(II) any State funds expended for the medicaid program under subchapter XIX of this chapter;

(III) any State funds which are used to match Federal funds provided under section 603(a)(5) of this title; or

(IV) any State funds which are expended as a condition of receiving Federal funds other than under this section.

Notwithstanding subclause (IV) of the preceding sentence, such term includes expenditures by a State for child care in a fiscal year to the extent that the total amount of the expenditures does not exceed the amount of State expenditures in fiscal year 1994 or 1995 (whichever is the greater) that equal the non-Federal share for the programs described in section 618(a)(1)(A) of this title.

(v) Source of data

In determining expenditures by a State for fiscal years 1994 and 1995, the Secretary shall use information which was reported by the State on ACF Form 231 or (in the case of expenditures under part F of this subchapter) ACF Form 331, available as of the dates specified in clauses (ii) and (iii) of section 603(a)(1)(D) of this title.

(8) Noncompliance of State child support enforcement program with requirements of part D of this subchapter

(A) In general

If the Secretary finds, with respect to a State's program under part D of this subchapter, in a fiscal year beginning on or after October 1, 1997

(i) (I) on the basis of data submitted by a State pursuant to section 654(15)(B) of this title, or on the basis of the results of a review conducted under section 652(a)(4) of this title, that the State program failed to achieve the paternity establishment percentages (as defined in section 652(g)(2) of this title), or to meet other performance measures that may be established by the Secretary;

(H) on the basis of the results of an audit or audits conducted under section 652(a)(4)(C)(i) of this title that the State data submitted pursuant to section 654(15)(B) of this title is incomplete or unreliable; or

(III) on the basis of the results of an audit or audits conducted under section 652(a)(4)(C) of this title that a State failed to substantially comply with 1 or more of the requirements of part D of this subchapter (other than paragraph (24), or subparagraph (A) or (B)(i) of paragraph (27), of section 654 of this title); and

(ii) that, with respect to the succeeding fiscal year

(I) the State failed to take sufficient corrective action to achieve the appropriate performance levels or compliance as described in subparagraph (A)(i); or

(II) the data submitted by the State pursuant to section 654(15)(B) of this title is incomplete or unreliable;

the amounts otherwise payable to the State under this part for quarters following the end of such

succeeding fiscal year, prior to quarters following the end of the first quarter throughout which the State program has achieved the paternity establishment percentages or other performance measures as described in subparagraph (A)(i)(I), or is in substantial compliance with 1 or more of the requirements of part D of this subchapter as described in subparagraph (A)(i)(III), as appropriate, shall be reduced by the percentage specified in subparagraph (B).

(B) Amount of reductions

The reductions required under subparagraph (A) shall be-

(i) not less than 1 nor more than 2 percent;

(ii) not less than 2 nor more than 3 percent, if the finding is the 2nd consecutive finding made pursuant to subparagraph (A); or

(iii) not less than 3 nor more than 5 percent, if the finding is the 3rd or a subsequent consecutive such finding.

(C) Disregard of noncompliance which is of a technical nature

For purposes of this section and section 652(a)(4) of this title, a State determined as a result of an audit-

(i) to have failed to have substantially complied with 1 or more of the requirements of part D of this subchapter shall be determined to have achieved substantial compliance only if the Secretary determines that the extent of the noncompliance is of a technical

nature which does not adversely affect the performance of the State's program under part D of this subchapter; or

(ii) to have submitted incomplete or unreliable data pursuant to section 654(15)(B) of this title shall be determined to have submitted adequate data only if the Secretary determines that the extent of the incompleteness or unreliability of the data is of a technical nature which does not adversely affect the determination of the level of the State's paternity establishment percentages (as defined under section 652(g)(2) of this title) or other performance measures that may be established by the Secretary.

(9) Failure to comply with 5-year limit on assistance

If the Secretary determines that a State has not complied with section 608(a)(7) of this title during a fiscal year, the Secretary shall reduce the grant payable to the State under section 603(a)(1) of this title for the immediately succeeding fiscal year by an amount equal to 5 percent of the State family assistance grant.

(10) Failure of State receiving amounts from contingency fund to maintain 100 percent of historic effort

If, at the end of any fiscal year during which amounts from the Contingency Fund for State Welfare Programs have been paid to a State, the Secretary finds that the qualified State expenditures (as defined in paragraph (7)(B)(i) (other than the expenditures described in subclause (I)(bb) of that paragraph)) under the State program funded under this part for the fiscal year are less than 100 percent of historic State expenditures (as defined in paragraph (7)(B)(iii) of this subsection), excluding any amount expended by the State for child

care under subsection (g) or (i) of section 602 of this title (as in effect during fiscal year 1994) for fiscal year 1994, the Secretary shall reduce the grant payable to the State under section 603(a)(1) of this title for the immediately succeeding fiscal year by the total of the amounts so paid to the State that the State has not remitted under section 603(b)(6) of this title.

(11) Failure to maintain assistance to adult single custodial parent who cannot obtain child care for child under age 6

(A) In general

If the Secretary determines that a State to which a grant is made under section 603 of this title for a fiscal year has violated section 607(e)(2) of this title during the fiscal year, the Secretary shall reduce the grant payable to the State under section 603(a)(1) of this title for the immediately succeeding fiscal year by an amount equal to not more than 5 percent of the State family assistance grant.

(B) Penalty based on severity of failure

The Secretary shall impose reductions under subparagraph (A) with respect to a fiscal year based on the degree of noncompliance.

(12) Requirement to expend additional State funds to replace grant reductions; penalty for failure to do so

If the grant payable to a State under section 603(a)(1) of this title for a fiscal year is reduced by reason of this subsection, the State shall, during the immediately succeeding fiscal year, expend under the State program funded under this part an amount equal to the total amount of such reductions. If the State fails during such succeeding fiscal year to make the expenditure required by the preceding sentence from its own funds, the Secretary may reduce the grant payable to the State under section 603(a)(1) of this title for the fiscal year

that follows such succeeding fiscal year by an amount equal to the sum of-

(A) not more than 2 percent of the State family assistance grant; and

(B) the amount of the expenditure required by the preceding sentence.

(13) Penalty for failure of state to maintain historic effort during year in which welfare-to-work grant is received

If a grant is made to a State under section 603(a)(5)(A) of this title for a fiscal year and paragraph (7) of this subsection requires the grant payable to the State under section 603(a)(1) of this title to be reduced for the immediately succeeding fiscal year, then the Secretary shall reduce the grant payable to the State under section 603(a)(1) of this title for such succeeding fiscal year by the amount of the grant made to the State under section 603(a)(5)(A) of this title for the fiscal year.

(14) Penalty for failure to reduce assistance for recipients refusing without good cause to work

(A) In general

If the Secretary determines that a State to which a grant is made under section 603 of this title in a fiscal year has violated section 607(e) of this title during the fiscal year, the Secretary shall reduce the grant payable to the State under section 603(a)(1) of this title for the immediately succeeding fiscal year by an amount equal to not less than 1 percent and not more than 5 percent of the State family assistance grant.

(B) Penalty based on severity of failure

The Secretary shall impose reductions under subparagraph (A) with respect to a fiscal year based on the degree of noncompliance.

(b) Reasonable cause exception

(1) In general

The Secretary may not impose a penalty on a State under subsection (a) of this section with respect to a requirement if the Secretary determines that the State has reasonable cause for failing to comply with the requirement.

(2) Exception

Paragraph (1) of this subsection shall not apply to any penalty under paragraph (6), (7), (8), (10), (12), or (13) of subsection (a) of this section.

(c) Corrective compliance plan

(1) In general

(A) Notification of violation

Before imposing a penalty against a State under subsection (a) of this section with respect to a violation of this part, the Secretary shall notify the State of the violation and allow the State the opportunity to enter into a corrective compliance plan in accordance with this subsection which outlines how the State will correct or discontinue, as appropriate, the violation and how the State will insure continuing compliance with this part.

(B) 60-day period to propose a corrective compliance plan

During the 60-day period that begins on the date the State receives a notice provided under subparagraph (A) with respect to a violation, the State may submit to the Federal Government a corrective compliance plan to correct or discontinue, as appropriate, the violation.

(C) Consultation about modifications

During the 60-day period that begins with the date the Secretary receives a corrective compliance plan submitted by a State in accordance with subparagraph (B), the Secretary may consult with the State on modifications to the plan.

(D) Acceptance of plan

A corrective compliance plan submitted by a State in accordance with subparagraph (B) is deemed to be accepted by the Secretary if the Secretary does not accept or reject the plan during 60-day period that begins on the date the plan is submitted.

(2) Effect of correcting or discontinuing violation

The Secretary may not impose any penalty under subsection (a) of this section with respect to any violation covered by a State corrective compliance plan accepted by the Secretary if the State corrects or discontinues, as appropriate the violation pursuant to the plan.

(3) Effect of failing to correct or discontinue violation

The Secretary shall assess some or all of a penalty imposed on a State under subsection (a) of this section with respect to a violation if the State does not, in a timely manner, correct or discontinue, as appropriate, the violation pursuant to a State corrective compliance plan accepted by the Secretary.

(4) Inapplicability to certain penalties

This subsection shall not apply to the imposition of a penalty against a State under paragraph (6), (7), (8), (10), (12), or (13) of subsection (a) of this section.

(d) Limitation on amount of penalties

(1) In general

In imposing the penalties described in subsection (a) of this section, the Secretary shall not reduce any quarterly payment to a State by more than 25 percent.

(2) Carry forward of unrecovered penalties

To the extent that paragraph (1) of this subsection prevents the Secretary from recovering during a fiscal year the full amount of penalties imposed on a State under subsection (a) of this section for a prior fiscal year, the Secretary shall apply any remaining amount of such penalties to the grant payable to the State under section 603(a)(1) of this title for the immediately succeeding fiscal year.

§ 610. Appeal of adverse decision

(a) In general

Within 5 days after the date the Secretary takes any adverse action under this part with respect to a State, the Secretary shall notify the chief executive officer of the State of the adverse action, including any action with respect to the State plan submitted under section 602 of this title or the imposition of a penalty under section 609 of this title.

(b) Administrative review

(1) In general

Within 60 days after the date a State receives notice under subsection (a) of this section of an adverse action, the State may appeal the action, in whole or in part, to the Departmental Appeals Board established in the Department of Health and Human Services (in this section referred to as the "Board") by filing an appeal with the Board.

(2) Procedural rules

The Board shall consider an appeal filed by a State under paragraph (1) on the basis of such documentation as the State may submit and as the Board may require

to support the final decision of the Board. In deciding whether to uphold an adverse action or any portion of such an action, the Board shall conduct a thorough review of the issues and take into account all relevant evidence. The Board shall make a final determination with respect to an appeal filed under paragraph (1) not less than 60 days after the date the appeal is filed.

(c) Judicial review of adverse decision

(1) In general

Within 90 days after the date of a final decision by the Board under this section with respect to an adverse action taken against a State, the State may obtain judicial review of the final decision (and the findings incorporated into the final decision) by filing an action in--

(A) the district court of the United States for the judicial district in which the principal or headquarters office of the State agency is located; or

(B) the United States District Court for the District of Columbia.

(2) Procedural rules

The district court in which an action is filed under paragraph (1) shall review the final decision of the Board on the record established in the administrative proceeding, in accordance with the standards of review prescribed by subparagraphs (A) through (E) of section 706(2) of Title 5. The review shall be on the basis of the documents and supporting data submitted to the Board.

§ 611. Data collection and reporting

(a) Quarterly reports by States

(1) General reporting requirement

(A) Contents of report

Each eligible State shall collect on a monthly basis, and report to the Secretary on a quarterly basis, the following disaggregated case record information on the families receiving assistance under the State program funded under this part (except for information relating to activities carried out under section 603(a)(5) of this title):

(i) The county of residence of the family.

(ii) Whether a child receiving such assistance or an adult in the family is receiving--

(I) Federal disability insurance benefits;

(II) benefits based on Federal disability status;

(III) aid under a State plan approved under subchapter XIV of this chapter (as in effect without regard to the amendment made by section 301 of the Social Security Amendments of 1972));

(IV) aid or assistance under a State plan approved under subchapter XVI of this chapter (as in effect without regard to such amendment) by reason of being permanently and totally disabled; or

(V) supplemental security income benefits under subchapter XVI of this chapter (as in effect pursuant to such amendment) by reason of disability.

(iii) The ages of the members of such families.

(iv) The number of individuals in the family, and the relation of each family member to the head of the family.

(v) The employment status and earnings of the employed adult in the family.

(vi) The marital status of the adults in the family, including whether such adults have never married, are widowed, or are divorced.

(vii) The race and educational level of each adult in the family.

(viii) The race and educational level of each child in the family.

(ix) Whether the family received subsidized housing, medical assistance under the State plan approved under subchapter XIX of this chapter, food stamps, or subsidized child care, and if the latter 2, the amount received.

(x) The number of months that the family has received each type of assistance under the program.

(xi) If the adults participated in, and the number of hours per week of participation in, the following activities:

(I) Education.

(II) Subsidized private sector employment.

(III) Unsubsidized employment.

(IV) Public sector employment, work experience, or community service.

(V) Job search.

(VI) Job skills training or on-the-job training.

(VII) Vocational education.

(xii) Information necessary to calculate participation rates under section 607 of this title.

(xiii) The type and amount of assistance received under the program, including the amount of and reason for any reduction of assistance (including sanctions).

(xiv) Any amount of unearned income received by any member of the family.

(xv) The citizenship of the members of the family.

(xvi) From a sample of closed cases, whether the family left the program, and if so, whether the family left due to--

(I) employment;

(II) marriage;

(III) the prohibition set forth in section 608(a)(7) of this title;

(IV) sanction; or

(V) State policy.

(xvii) With respect to each individual in the family who has not attained 20 years

of age, whether the individual is a parent of a child in the family.

(xviii) Repealed. Pub.L. 106-113, Div. B, § 1000(a)(4) [Title VIII, § 804(a)(2)], Nov. 29, 1999, 113 Stat. 1535, 1501A-284

(B) Use of samples

(i) Authority

A State may comply with subparagraph (A) by submitting disaggregated case record information on a sample of families selected through the use of scientifically acceptable. sampling methods approved by the Secretary.

(ii) Sampling and other methods

The Secretary shall provide the States with such case sampling plans and data collection procedures as the Secretary deems necessary to produce statistically valid estimates of the performance of State programs funded under this part. The Secretary may develop and implement procedures for verifying the quality of data submitted by the States.

(2) Report on use of Federal funds to cover administrative costs and overhead

The report required by paragraph (1) for a fiscal quarter shall include a statement of the percentage of the funds paid to the State under this part for the quarter that are used to cover administrative costs or overhead, with a separate statement of the percentage of such funds that are used to cover administrative costs or overhead

incurred for programs operated with funds provided under section 603(a)(5) of this title.

(3) Report on State expenditures on programs for needy families

The report required by paragraph (1) for a fiscal quarter shall include a statement of the total amount expended by the State during the quarter on programs for needy families, with a separate statement of the total amount expended by the State during the quarter on programs operated with funds provided under section 603(a)(5) of this title.

(4) Report on noncustodial parents participating in work activities

The report required by paragraph (1) for a fiscal quarter shall include the number of noncustodial parents in the State who participated in work activities (as defined in section 607(d) of this title) during the quarter, with a separate statement of the number of such parents who participated in programs operated with funds provided under section 603(a)(5) of this title.

(5) Report on transitional services

The report required by paragraph (1) for a fiscal quarter shall include the total amount expended by the State during the quarter to provide transitional services to a family that has ceased to receive assistance under this part because of employment, along with a description of such services.

(6) Report on families receiving assistance

The report required by paragraph (1) for a fiscal quarter shall include for each month in the quarter-

> (A) the number of families and individuals receiving assistance under the State program funded under this part (including the number of 2-parent and 1- parent families);

(B) the total dollar value of such assistance received by all families; and

(C) with respect to families and individuals participating in a program operated with funds provided under section 603(a)(5) of this title-

(i) the total number of such families and individuals; and

(ii) the number of such families and individuals whose participation in such a program was terminated during a month.

(7) Regulations

The Secretary shall prescribe such regulations as may be necessary to define the data elements with respect to which reports are required by this subsection, and shall consult with the Secretary of Labor in defining the data elements with respect to programs operated with funds provided under section 603(a)(5) of this title.

(b) Annual reports to the Congress by the Secretary

Not later than 6 months after the end of fiscal year 1997, and each fiscal year thereafter, the Secretary shall transmit to the Congress a report describing-

(1) whether the States are meeting

(A) the participation rates described in section 607(a) of this title; and

(B) the objectives of-

(i) increasing employment and earnings of needy families, and child support collections; and

(ii) decreasing out-of-wedlock pregnancies and child poverty;

(2) the demographic and financial characteristics of families applying for assistance, families receiving assistance, and families that become ineligible to receive assistance;

(3) the characteristics of each State program funded under this part; and

(4) the trends in employment and earnings of needy families with minor children living at home.

§ 611 a. State required to provide certain information

Each State to which a grant is made under section 603 of this title shall, at least 4 times annually and upon request of the Immigration and Naturalization Service, furnish the Immigration and Naturalization Service with the name and address of, and other identifying information on, any individual who the State knows is unlawfully in the United States.

§ 612. Direct funding and administration by Indian tribes

(a) Grants for Indian tribes

(1) Tribal family assistance grant

(A) In general

For each of fiscal years 1997, 1998, 1999, 2000, 2001, and 2002, the Secretary shall pay to each Indian tribe that has an approved tribal family assistance plan a tribal family assistance grant for the fiscal year in an amount equal to the amount determined under subparagraph (B), which shall be reduced for a fiscal year, on a pro rata basis for each quarter, in the case of a tribal family assistance plan approved during a fiscal year for which the plan is to be in effect, and shall reduce the grant payable under section 603(a)(1) of this title to any State in which lies the service area or areas of the Indian tribe by that portion of the

amount so determined that is attributable to expenditures by the State.

(B) Amount determined

(i) In general

The amount determined under this subparagraph is an amount equal to the total amount of the Federal payments to a State or States under section 603 of this title (as in effect during such fiscal year) for fiscal year 1994 attributable to expenditures (other than child care expenditures) by the State or States under this part and part F of this subchapter (as so in effect) for fiscal year 1994 for Indian families residing in the service area or areas identified by the Indian tribe pursuant to subsection (b)(1)(C) of this section.

(ii) Use of State submitted data

(I) In general

The Secretary shall use State submitted data to make each determination under clause (i).

(II) Disagreement with determination

If an Indian tribe or tribal organization disagrees with State submitted data described under subclause (1), the Indian tribe or tribal organization may submit to the Secretary such additional information as may be relevant to making the determination under clause (i) and the Secretary may consider such information before making such determination.

(2) Grants for Indian tribes that received jobs funds

(A) In general

For each of fiscal years 1997, 1998, 1999, 2000, 2001, and 2002, the Secretary shall pay to each eligible Indian tribe that proposes to operate a program described in subparagraph (C) a grant in an amount equal to the amount received by the Indian tribe in fiscal year 1994 under section 682(i) of this title (as in effect during fiscal year 1994).

(B) Eligible Indian tribe

For purposes of subparagraph (A), the term "eligible Indian tribe" means an Indian tribe or Alaska Native organization that conducted a job opportunities and basic skills training program in fiscal year 1995 under section 682(i) of this title (as in effect during fiscal year 1995).

(C) Use of grant

Each Indian tribe to which a grant is made under this paragraph shall use the grant for the purpose of operating a program to make work activities available to such population and such service area or areas as the tribe specifies.

(D) Appropriation

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated $7,633,287 for each fiscal year specified in subparagraph (A) for grants under subparagraph (A).

(3) Welfare-to-work grants

(A) In general

The Secretary of Labor shall award a grant in accordance with this paragraph to an Indian tribe for each fiscal year specified in section 403(a)(5)(H) of this title for which the Indian tribe is a welfare-to-work tribe, in such amount as the Secretary of Labor deems appropriate, subject to subparagraph (B) of this paragraph.

(B) Welfare-to-work tribe

An Indian tribe shall be considered a welfare-to-work tribe for a fiscal year for purposes of this paragraph if the Indian tribe meets the following requirements:

(i) The Indian tribe has submitted to the Secretary of Labor a plan which describes how, consistent with section 603(a)(5) of this title, the Indian tribe will use any funds provided under this paragraph during the fiscal year. If the Indian tribe has a tribal family assistance plan, the plan referred to in the preceding sentence shall be in the form of an addendum to the tribal family assistance plan.

(ii) The Indian tribe is operating a program under a tribal family assistance plan approved by the Secretary of Health and Human Services, a program described in paragraph (2)(C), or an employment program funded through other sources under which substantial services are provided to recipients of assistance under a program funded under this part.

(iii) The Indian tribe has provided the Secretary of Labor with an estimate of the amount that the Indian tribe intends to expend during the fiscal year (excluding

tribal expenditures described in section 609(a)(7)(B)(iv) of this title (other than subclause (III) thereof)) pursuant to this paragraph.

(iv) The Indian tribe has agreed to negotiate in good faith with the Secretary of Health and Human Services with respect to the substance and funding of any evaluation under section 613(;) of this title, and to cooperate with the conduct of any such evaluation.

(C) Limitations on use of funds

(i) In general

Section 603(a)(5)(C) of this title shall apply to funds provided to Indian tribes under this paragraph in the same manner in which such section applies to funds provided under section 603(a)(5) of this title.

(ii) Waiver authority

The Secretary of Labor may waive or modify the application of a provision of section 603(a)(5)(C) of this title (other than clause (viii) thereof) with respect to an Indian tribe to the extent necessary to enable the Indian tribe to operate a more efficient or effective program with the funds provided under this paragraph.

(iii) Regulations

Within 90 days after August 5, 1997, the Secretary of Labor, after consultation with the Secretary of Health and Human

Services and the Secretary of Housing and Urban Development, shall prescribe such regulations as may be necessary to implement this paragraph.

(b) 3-year tribal family assistance plan

(1) In general

Any Indian tribe that desires to receive a tribal family assistance grant shall submit to the Secretary a 3-year tribal family assistance plan that-

(A) outlines the Indian tribe's approach to providing welfare-related services for the 3-year period, consistent with this section;

(B) specifies whether the welfare-related services provided under the plan will be provided by the Indian tribe or through agreements, contracts, or compacts with intertribal consortia, States, or other entities;

(C) identifies the population and service area or areas to be served by such plan;

(D) provides that a family receiving assistance under the plan may not receive duplicative assistance from other State or tribal programs funded under this part;

(E) identifies the employment opportunities in or near the service area or areas of the Indian tribe and the manner in which the Indian tribe will cooperate and participate in enhancing such opportunities for recipients of assistance under the plan consistent with any applicable State standards; and

(F) applies the fiscal accountability provisions of section 5(f)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450c(f)(1)), relating to the submission of a single-

agency audit report required by chapter 75 of Title 31.

(2) Approval

The Secretary shall approve each tribal family assistance plan submitted in accordance with paragraph (1).

(3) Consortium of tribes

Nothing in this section shall preclude the development and submission of a single tribal family assistance plan by the participating Indian tribes of an intertribal consortium.

(c) Minimum work participation requirements and time limits

The Secretary, with the participation of Indian tribes, shall establish for each Indian tribe receiving a grant under this section minimum work participation requirements, appropriate time limits for receipt of welfare- related services under the grant, and penalties against individuals-

(1) consistent with the purposes of this section;

(2) consistent with the economic conditions and resources available to each tribe; and

(3) similar to comparable provisions in section 607(e) of this title.

(d) Emergency assistance

Nothing in this section shall preclude an Indian tribe from seeking emergency assistance from any Federal loan program or emergency fund.

(e) Accountability

Nothing in this section shall be construed to limit the ability of the Secretary to maintain program funding accountability consistent with-

(1) generally accepted accounting principles; and

(2) the requirements of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.).

(f) Eligibility for Federal loans

Section 606 of this title shall apply to an Indian tribe with an approved tribal assistance plan in the same manner as such section applies to a State, except that section 606(c) of this title shall be applied by substituting "section 612(a) of this title" for "section 603(a) of this title".

(g) Penalties

(1) Subsections (a)(1), (a)(6), (b), and (c) of section 609 of this title, shall apply to an Indian tribe with an approved tribal assistance plan in the same manner as such subsections apply to a State.

(2) Section 609(a)(3) of this title shall apply to an Indian tribe with an approved tribal assistance plan by substituting "meet minimum work participation requirements established under section 612(c) of this title" for "comply with section 607(a) of this title".

(h) Data collection and reporting

Section 611 of this title shall apply to an Indian tribe with an approved tribal family assistance plan.

(i) Special rule for Indian tribes in Alaska

(1) In general

Notwithstanding any other provision of this section, and except as provided in paragraph (2), an Indian tribe in the State of Alaska that receives a tribal family

assistance grant under this section shall use the grant to operate a program in accordance with requirements comparable to the requirements applicable to the program of the State of Alaska funded under this part. Comparability of programs shall be established on the basis of program criteria developed by the Secretary in consultation with the State of Alaska and such Indian tribes.

(2) Waiver

A Indian tribe described in paragraph (1) may apply to the appropriate State authority to receive a waiver of the requirement of paragraph (1).

613. Research, evaluations and national studies

(a) Research

The Secretary , directly or through grants, contracts, or interagency agreements, shall conduct research on the benefits, effects, and costs of operating different State programs funded under this part, including time limits relating to eligibility for assistance. The research shall include studies on the effects of different programs and the operation of such programs on welfare dependency, illegitimacy, teen pregnancy, employment rates, child well-being, and any other area the Secretary deems appropriate. The Secretary shall also conduct research on the costs and benefits of State activities under section 607 of this title.

(b) Development and evaluation of innovative approaches to reducing welfare dependency and increasing child well-being

(1) In general

The Secretary may assist States in developing, and shall evaluate, innovative approaches for reducing welfare dependency and increasing the well-being of minor children living at home with respect to recipients of assistance under programs funded under this part.

The Secretary may provide funds for training and technical assistance to carry out the approaches developed pursuant to this paragraph.

(2) Evaluations

In performing the evaluations under paragraph (1), the Secretary shall, to the maximum extent feasible, use random assignment as an evaluation methodology.

(c) Dissemination of information

The Secretary shall develop innovative methods of disseminating information on any research, evaluations, and studies conducted under this section, including the facilitation of the sharing of information and best practices among States and localities through the use of computers and other technologies.

(d) Annual ranking *of* States and review of most and least successful work programs

(1) Annual ranking of States

The Secretary shall rank annually the States to which grants are paid under section 603 of this title in the order of their success in placing recipients of assistance under the State program funded under this part into long-term private sector jobs, reducing the overall welfare caseload, and, when a practicable method for calculating this information becomes available, diverting individuals from formally applying to the State program and receiving assistance. In ranking States under this subsection, the Secretary shall take into account the average number of minor children living at home in families in the State that have incomes below the poverty line and the amount of funding provided each State for such families.

(2) Annual review of most and least successful work programs

The Secretary shall review the programs of the 3 States most recently ranked highest under paragraph (1) and the 3 States most recently ranked lowest under paragraph (1) that provide parents with work experience, assistance in finding employment, and other work preparation activities and support services to enable the families of such parents to leave the program and become self-sufficient.

(e) Annual ranking of States and review of issues relating to out-of-wedlock births

(1) In general

The Secretary shall annually rank States to which grants are made under section 603 of this title based on the following ranking factors:

(A) Absolute out-of-wedlock ratios

The ratio represented by-

(i) the total number of out-of-wedlock births in families receiving assistance under the State program under this part in the State for the most recent year for which information is available; over

(ii) the total number of births in families receiving assistance under the State program under this part in the State for the year.

(B) Net changes in the out-of-wedlock ratio

The difference between the ratio described in subparagraph (A) with respect to a State for the most recent year for which such information is available and the ratio with respect to the State for the immediately preceding year.

(2) Annual review

The Secretary shall review the programs of the 5 States most recently ranked highest under paragraph (1) and the 5 States most recently ranked the lowest under paragraph (1).

(f) State-initiated evaluations

A State shall be eligible to receive funding to evaluate the State program funded under this part if-

(1) the State submits a proposal to the Secretary for the evaluation;

(2) the Secretary determines that the design and approach of the evaluation is rigorous and is likely to yield information that is credible and will be useful to other States; and

(3) unless otherwise waived by the Secretary, the State contributes to the cost of the evaluation, from non-Federal sources, an amount equal to at least 10 percent of the cost of the evaluation.

(g) Report on circumstances of certain children and families

(1) In general

Beginning 3 years after August 22, 1996, the Secretary of Health and Human Services shall prepare and submit to the Committees on Ways and Means and on Education and the Workforce of the House of Representatives and to the Committees on Finance and on Labor and Resources of the Senate annual reports that examine in detail the matters described in paragraph (2) with respect to each of the following groups for the period after August 22, 1996:

(A) Individuals who were children in families that have become ineligible for assistance under a State program funded under this part by reason of having reached a time limit on the provision of such assistance.

(B) Children born after August 22, 1996 to parents who, at the time of such birth, had not attained 20 years of age.

(C) Individuals who, after August 22, 1996, became parents before attaining 20 years of age.

(2) Matters described

The matters described in this paragraph are the following:

(A) The percentage of each group that has dropped out of secondary school (or the equivalent), and the percentage of each group at each level of educational attainment.

(B) The percentage of each group that is employed.

(C) The percentage of each group that has been convicted of a crime or has been adjudicated as a delinquent.

(D) The rate at which the members of each group are born, or have children, out-of-wedlock, and the percentage of each group that is married.

(E) The percentage of each group that continues to participate in State programs funded under this part.

(F) The percentage of each group that has health insurance provided by a private entity (broken down by whether the insurance is provided through an employer or otherwise), the percentage that has health insurance provided by an agency of government, and the percentage that does not have health insurance.

(G) The average income of the families of the members of each group.

(H) Such other matters as the Secretary deems appropriate.

(h) Funding of studies and demonstrations

(1) In general

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated $15,000,000 for each of fiscal years 1997 through 2002 for the purpose of paying-

(A) the cost of conducting the research described in subsection (a) of this section;

(B) the cost of developing and evaluating innovative approaches for reducing welfare dependency and increasing the well-being of minor children under subsection (b) of this section;

(C) the Federal share of any State-initiated study approved under subsection (f) of this section; and

(D) an amount determined by the Secretary to be necessary to operate and evaluate demonstration projects, relating to this part, that are in effect or approved under section 1315 of this title as of August 22, 1996, and are continued after such date.

(2) Allocation

Of the amount appropriated under paragraph (1) for a fiscal year-

(A) 50 percent shall be allocated for the purposes described in subparagraphs (A) and (B) of paragraph (1), and

(B) 50 percent shall be allocated for the purposes described in subparagraphs (C) and (D) of paragraph (1).

(3) Demonstrations of innovative strategies

The Secretary may implement and evaluate demonstrations of innovative and promising strategies which-

(A) provide one-time capital funds to establish, expand, or replicate programs;

(B) test performance-based grant-to-loan financing in which programs meeting performance targets receive grants while programs not meeting such targets repay funding on a prorated basis; and

(C) test strategies in multiple States and types of communities.

(i) Child poverty rates

(1) In general

Not later than May 31, 1998, and annually thereafter, the chief executive officer of each State shall submit to the Secretary a statement of the child poverty rate in the State as of August 22, 1996 or the date of the most recent prior statement under this paragraph.

(2) Submission of corrective action plan

Not later than 90 days after the date a State submits a statement under paragraph (1) which indicates that, as a result of the amendments made by section 103 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the child poverty rate of the State has increased by 5 percent or more since the most recent prior statement under paragraph (1), the State shall prepare and submit to the Secretary a corrective action plan in accordance with paragraph (3).

(3) Contents of plan

A corrective action plan submitted under paragraph (2) shall outline the manner in which the State will reduce

the child poverty rate in the State. The plan shall include a description of the actions to be taken by the State under such plan.

(4) Compliance with plan

A State that submits a corrective action plan that the Secretary has found contains the information required by this subsection shall implement the corrective action plan until the State determines that the child poverty rate in the State is less than the lowest child poverty rate on the basis of which the State was required to submit the corrective action plan.

(5) Methodology

The Secretary shall prescribe regulations establishing the methodology by which a State shall determine the child poverty rate in the State. The methodology shall take into account factors including the number of children who receive free or reduced-price lunches, the number of food stamp households, and, to the extent available, county-by-county estimates of children in poverty as determined by the Census Bureau.

(j) Evaluation of welfare-to-work programs

(1) Evaluation

The Secretary, in consultation with the Secretary of Labor and the Secretary of Housing and Urban Development--

(A) shall develop a plan to evaluate how grants made under sections 603(a)(5) and 612(a)(3) of this title have been used;

(B) may evaluate the use of such grants by such grantees as the Secretary deems appropriate, in accordance with an agreement entered into with the grantees after good-faith negotiations; and

(C) is urged to include the following outcome measures in the plan developed under subparagraph (A):

(i) Placements in unsubsidized employment, and placements in unsubsidized employment that last for at least 6 months.

(ii) Placements in the private and public sectors.

(iii) Earnings of individuals who obtain employment.

(iv) Average expenditures per placement.

(2) Reports to the Congress

(A) In general

Subject to subparagraphs (B) and (C), the Secretary, in consultation with the Secretary of Labor and the Secretary of Housing and Urban Development, shall submit to the Congress reports on the projects funded under section 603(a)(5) and 612(a)(3) of this title and on the evaluations of the projects.

(B) Interim report

Not later than January 1, 1999, the Secretary shall submit an interim report on the matter described in subparagraph (A).

(C) Final report

Not later than January 1, 2001, (or at a later date, if the Secretary informs the Committees of the Congress with jurisdiction over the subject matter of the report) the Secretary shall submit a final report on the matter described in subparagraph (A).

§ 614. Study by the Census Bureau

(a) In general

The Bureau of the Census shall continue to collect data on the 1992 and 1993 panels of the Survey of Income and Program Participation as necessary to obtain such information as will enable interested persons to evaluate the impact of the amendments made by title I of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 on a random national sample of recipients of assistance under State programs funded under this part and (as appropriate) other low-income families, and in doing so, shall pay particular attention to the issues of out-of-wedlock birth, welfare dependency, the beginning and end of welfare spells, and the causes of repeat welfare spells, and shall obtain information about the status of children participating in such panels.

(b) Appropriation

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated $10,000,000 for each of fiscal years 1996, 1997, 1998, 1999, 2000, 2001, and 2002 for payment to the Bureau of the Census to carry out subsection (a) of this section.

§ 615. Waivers

(a) Continuation of waivers

(1) Waivers in effect on August 22, 1996

(A) In general

Except as provided in subparagraph (B), if any waiver granted to a State under section 1315 of this title or otherwise which relates to the provision of assistance under a State plan under this part (as in effect on September 30, 1996) is in effect as of August 22, 1996, the amendments

made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (other than by section 103(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996) shall not apply with respect to the State before the expiration (determined without regard to any extensions) of the waiver to the extent such amendments are inconsistent with the waiver.

(B) Financing limitation

Notwithstanding any other provision of law, beginning with fiscal year 1996, a State operating under a waiver described in subparagraph (A) shall be entitled to payment under section 603 of this title for the fiscal year, in lieu of any other payment provided for in the waiver.

(2) Waivers granted subsequently

(A) In general

Except as provided in subparagraph (B), if any waiver granted to a State under section 1315 of this title or otherwise which relates to the provision of assistance under a State plan under this part (as in effect on September 30, 1996) is submitted to the Secretary before August 22, 1996 and approved by the Secretary on or before July 1, 1997, and the State demonstrates to the satisfaction of the Secretary that the waiver will not result in Federal expenditures under this subchapter (as in effect without regard to the amendments made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996) that are greater than would occur in the absence of the waiver, the amendments made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (other than by section 103(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996) shall not apply with respect to the State before the

expiration (determined without regard to any extensions) of the waiver to the extent the amendments made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 are inconsistent with the waiver.

(B) No effect on new work requirements

Notwithstanding subparagraph (A), a waiver granted under section 1315 of this title or otherwise which relates to the provision of assistance under a State program funded under this part (as in effect on September 30, 1996) shall not affect the applicability of section 607 of this title to the State.

(b) State option to terminate waiver

(1) In general

A State may terminate a waiver described in subsection (a) of this section before the expiration of the waiver.

(2) Report

A State which terminates a waiver under paragraph (1) shall submit a report to the Secretary summarizing the waiver and any available information concerning the result or effect of the waiver.

(3) Hold harmless provision

(A) In general

Notwithstanding any other provision of law, a State that, not later than the date described in subparagraph (B) of this paragraph, submits a written request to terminate a waiver described in subsection (a) of this section shall be held harmless for accrued cost neutrality liabilities incurred under the waiver.

(B) Date described

The date described in this subparagraph is 90 days following the adjournment of the first regular session of the State legislature that begins after August 22, 1996.

(c) Secretarial encouragement of current waivers

The Secretary shall encourage any State operating a waiver described in subsection (a) of this section to continue the waiver and to evaluate, using random sampling and other characteristics of accepted scientific evaluations, the result or effect of the waiver.

(d) Continuation of individual waivers

A State may elect to continue 1 or more individual waivers described in subsection (a) of this section.

§ 616. Administration

The programs under this part and part D of this subchapter shall be administered by an Assistant Secretary for Family Support within the Department of Health and Human Services, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be in addition to any other Assistant Secretary of Health and Human Services provided for by law, and the Secretary shall reduce the Federal workforce within the Department of Health and Human Services by an amount equal to the sum of 75 percent of the full-time equivalent positions at such Department that relate to any direct spending program, or any program funded through discretionary spending, that has been converted into a block grant program under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and the amendments made by such Act, and by an amount equal to 75 percent of that portion of the total full-time equivalent departmental management positions at such Department that bears the same relationship to the amount appropriated for any direct spending program, or any program funded

through discretionary spending, that has been converted into a block grant program under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and the amendments made by such Act, as such amount relates to the total amount appropriated for use by such Department, and, notwithstanding any other provision of law, the Secretary shall take such actions as may be necessary, including reductions in force actions, consistent with sections 3502 and 3595 of Title 5, to reduce the full-time equivalent positions within the Department of Health and Human Services by 245 full-time equivalent positions related to the program converted into a block grant under the amendments made by section 103 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, and by 60 full- time equivalent managerial positions in the Department.

§ 617. Limitation on Federal authority

No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.

§ 618. Funding for child care

(a) General child care entitlement

(1) General entitlement

Subject to the amount appropriated under paragraph (3), each State shall, for the purpose of providing child care assistance, be entitled to payments under a grant under this subsection for a fiscal year in an amount equal to the greater of-

(A) the total amount required to be paid to the State under section 603 of this title for fiscal year 1994 or 1995 (whichever is greater) with respect to expenditures for child care under subsections

(g) and (i) of section 602 of this title (as in effect before October 1, 1995); or

(B) the average of the total amounts required to be paid to the State for fiscal years 1992 through 1994 under the subsections referred to in subparagraph (A).

(2) Remainder

(A) Grants

The Secretary shall use any amounts appropriated for a fiscal year under paragraph (3), and remaining after the reservation described in paragraph (4) and after grants are awarded under paragraph (1), to make grants to States under this paragraph.

(B) Allotments to States

The total amount available for payments to States under this paragraph, as determined under subparagraph (A), shall be allotted among the States based on the formula used for determining the amount of Federal payments to each State under section 603(n) of this title (as in effect before October 1, 1995).

(C) Federal matching of State expenditures exceeding historical expenditures

The Secretary shall pay to each eligible State for a fiscal year an amount equal to the lesser of the State's allotment under subparagraph (B) or the Federal medical assistance percentage for the State for the fiscal year (as defined in section 1396d(b) of this title, as such section was in effect on September 30, 1995) of so much of the State's expenditures for child care in that fiscal year as exceed the total amount of expenditures by the State (including expenditures from amounts made available from Federal funds) in fiscal year 1994

or 1995 (whichever is greater) for the programs described in paragraph (1)(A).

(D) Redistribution

(i) In general

With respect to any fiscal year, if the Secretary determines (in accordance with clause (ii)) that any amounts allotted to a State under this paragraph for such fiscal year will not be used by such State during such fiscal year for carrying out the purpose for which such amounts are allotted, the Secretary shall make such amounts available in the subsequent fiscal year for carrying out such purpose to one or more States which apply for such funds to the extent the Secretary determines that such States will be able to use such additional amounts for carrying out such purpose. Such available amounts shall be redistributed to a State pursuant to section 603(n) of this title (as such section was in effect before October 1, 1995) by substituting "the number of children residing in all States applying for such funds" for "the number of children residing in the United States in the second preceding fiscal year".

(ii) Time of determination and distribution

The determination of the Secretary under clause (i) for a fiscal year shall be made not later than the end of the first quarter of the subsequent fiscal year. The redistribution of amounts under clause (i) shall be made as close as practicable to

the date on which such determination is made. Any amount made available to a State from an appropriation for a fiscal year in accordance with this subparagraph shall, for purposes of this part, be regarded as part of such State's payment (as determined under this subsection) for the fiscal year in which the redistribution is made.

(3) Appropriation

For grants under this section, there are appropriated-

(A) $1,967,000,000 for fiscal year 1997;

(B) $2,067,000,000 for fiscal year 1998;

(C) $2,167,000,000 for fiscal year 1999;

(D) $2,367,000,000 for fiscal year 2000;

(E) $2,567,000,000 for fiscal year 2001; and

(F) $2,717,000,000 for fiscal year 2002.

(4) Indian tribes

The Secretary shall reserve not less than 1 percent, and not more than 2 percent, of the aggregate amount appropriated to carry out this section in each fiscal year for payments to Indian tribes and tribal organizations.

(5) Data used to determine State and Federal shares of expenditures

In making the determinations concerning expenditures required under paragraphs (1) and (2)(C), the Secretary shall use information that was reported by the State on ACF Form 231 and available as of the applicable dates specified in clauses (i)(I), (ii), and (iii)(III) of section 603(a)(1)(D) of this title.

(b) Use of funds

(1) In general

Amounts received by a State under this section shall only be used to provide child care assistance. Amounts received by a State under a grant under subsection (a)(1) of this section shall be available for use by the State without fiscal year limitation.

(2) Use for certain populations

A State shall ensure that not less than 70 percent of the total amount of funds received by the State in a fiscal year under this section are used to provide child care assistance to families who are receiving assistance under a State program under this part, families who are attempting through work activities to transition off of such assistance program, and families who are at risk of becoming dependent on such assistance program.

(c) Application of Child Care and Development Block Grant Act of 1990

Notwithstanding any other provision of law, amounts provided to a State under this section shall be transferred to the lead agency under the Child Care and Development Block Grant Act of 1990 [42 U.S.C.A. § 9858 et seq.], integrated by the State into the programs established by the State under such Act, and be subject to requirements and limitations of such Act.

(d) Definition

As used in this section, the term "State" means each of the 50 States and the District of Columbia.

§ 619. Definitions

As used in this part:

(1) Adult

The term "adult" means an individual who is not a minor child.

(2) Minor child

The term "minor child" means an individual who-

(A) has not attained 18 years of age; or

(B) has not attained 19 years of age and is a full-time student in a secondary school (or in the equivalent level of vocational or technical training).

(3) Fiscal year

The term "fiscal year" means any 12-month period ending on September 30 of a calendar year.

(4) Indian, Indian tribe, and tribal organization

(A) In general

Except as provided in subparagraph (B), the terms "Indian", "Indian tribe", and "tribal organization" have the meaning given such terms by section 450b of Title 25.

(B) Special rule for Indian tribes in Alaska

The term "Indian tribe" means, with respect to the State of Alaska, only the Metlakatla Indian Community of the Annette Islands Reserve and the following Alaska Native regional nonprofit corporations:

(i) Arctic Slope Native Association.

(ii) Kawerak, Inc.

(iii) Maniilaq Association.

(iv) Association of Village Council Presidents.

(v) Tanana Chiefs Conference.

(vi) Cook Inlet Tribal Council.

(vii) Bristol Bay Native Association.

(viii) Aleutian and Pribilof Island Association.

(ix) Chugachmuit.

(x) Tlingit Haida Central Council.

(xi) Kodiak Area Native Association.

(xii) Copper River Native Association.

(xi) Kodiak Area Native Association.

(xii) Copper River Native Association.

Except as otherwise specifically provided, the term "State" means the 50 States of the United States, the District of Columbia, Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, and American Samoa.

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK

SOCIAL SERVICES LAW

CHAPTER 55 OF THE CONSOLIDATED LAWS

ARTICLE 5--ASSISTANCE AND CARE

TITLE 9-B--PUBLIC ASSISTANCE EMPLOYMENT PROGRAMS

§ 330. Definitions

1. Whenever used in this title:

a. the term "commissioner" means the commissioner of the state department of labor; and

b. the term "department" means the state department of labor.

2. "Net loss of cash income" shall mean the amount by which a family's gross income less any necessary work-related expenses is less than the cash assistance the individual was receiving at the time of receiving an offer of employment. Gross income includes, but is not limited to, earnings, unearned income and cash assistance.

3. "Child care" shall refer to any lawful form of care of a child, as defined by federal and state law and regulation, for less than twenty-four hours per day.

4. "Participant" shall mean an applicant for or recipient of public assistance who volunteers for or is required to participate in work activities as provided in this title.

5. Notwithstanding any other provision of this chapter or the labor law, recipients of public assistance who are required to participate in community service or work experience activities authorized pursuant to this title

shall be included within the meaning of the term "public employee" for the purposes of applying section twenty-seven-a of the labor law while engaged in community service or work experience programs under this title. In addition, such recipients shall be provided appropriate workers' compensation or equivalent protection for on-the-job injuries and tort claims protection on the same basis, but not necessarily at the same benefit level, as they are provided to other persons in the same or similar positions, while participating in community service or work experience activities under this title.

§ 331. Policies and purposes

1. It is hereby declared to be the policy of the state that there be programs under which individuals receiving public assistance will be furnished work activities and employment opportunities, and necessary services in order to secure unsubsidized employment that will assist participants to achieve economic independence. Such programs shall be established and operated in accordance with the provisions of this title and in compliance with federal and state law and regulations.

2. A social services district may contract or establish agreements with entities which comply with the standards to be established in regulations by the commissioner to provide work activities, including but not limited to, job training partnership act agencies, state agencies, school districts, boards of cooperative educational services, not-for-profit community based organizations, licensed trade schools or registered business schools, libraries, post- secondary educational institutions consistent with this title, and educational opportunity centers and local employers. A district shall, to the extent practicable and permitted under federal requirements, develop performance based contracts or agreements with such entities. Such standards shall include an evaluation procedure to ensure that services offered by a provider are sufficient to enhance substantially a participant's opportunity to secure unsubsidized employment or, when coupled

with or provided in conjunction with other activities, represent part of a comprehensive approach to enabling a participant to secure unsubsidized employment. Notwithstanding the provisions of section one hundred fifty-three of this article, expenditures pursuant to contracts or agreements with providers who do not meet the standards for approval of providers as defined in regulations will not be eligible for reimbursement by the department.

3. No social services district shall, in the exercising of the powers and duties established in this title, permit discrimination on the basis of race, color, national origin, sex, religion or handicap, in the selection of participants, their assignment or reassignment to work activities and duties, and the separate use of facilities or other treatment of participants.

§ 332. Participation and exemptions

1. In accordance with federal requirements and this title an applicant for or a recipient of public assistance shall not be required to participate in work activities if such individual is determined by the social services district to be exempt because he or she is:

(a) a person who is ill, incapacitated or sixty years of age or older or deemed to be disabled pursuant to section three hundred thirty-two-b of this title;

(b) a child who is under sixteen years of age or under the age of nineteen and attending fulltime a secondary, vocational or technical school;

(c) a person whose presence in the home is required because of the illness or incapacity of another member of the household, provided, that to the extent such person is providing care for such a member for a number of hours as required in section three hundred thirty-five-b of this title, such person shall be deemed to be participating in community service;

(d) a parent or other relative of a child who is personally providing care for such child under one year of age for a maximum period of twelve months, only three months of which shall be attributable to any one child, except as otherwise extended up to the twelve month period by the social services official;

(e) a woman who is pregnant, beginning thirty days prior to the medically verified date of delivery of her child.

2. A local social services official shall:

(a) make diligent efforts to assist a person who needs transportation to get to and from a work activity site in obtaining such transportation. Where lack of transportation is a direct barrier to participation in a work activity, the local district shall make a reasonable effort to assign the individual to an appropriate work activity at a site in closest possible proximity to such individual's residence;

(b) allow and give first consideration to volunteers who have not previously terminated participation in such program without good cause to participate in the program; provided, however, such consideration shall not preclude a district from requiring applicants or recipients to participate prior to consideration for or participation by such volunteers if such recipients or applicants are determined to be in greater need of the services provided pursuant to this title in accordance with criteria established by the district and submitted and approved as part of its local plan which may include, but not be limited to, length of time for which a recipient has been in receipt of public assistance benefits, education, age, health and skills.

(c) in accordance with regulations of the department, inform applicants and recipients of

the opportunity to participate voluntarily in work activities at time of application, recertification and contemporaneously with receipt of public assistance benefits on a periodic basis.

3. A social services official may require a participant in work activities to accept a job only if such official ensures that the participant and the family of such participant will experience no net loss of cash income resulting from acceptance of the job as determined under regulations of the department consistent with federal law and regulations. Pursuant to regulations of the department consistent with federal law and regulations, a social services district shall pay a supplement to a participant in the amount of such net loss of cash income that would otherwise occur. Such supplement shall constitute public assistance only for purposes of payment and reimbursement, and persons in receipt of such supplement shall not for any other purpose be considered to be recipients of public assistance.

§ 332-a. Supportive services

A social services district shall, subject to the availability of federal and state funds, provide such supportive services, including but not limited to transportation, work related expenses, child care for children up to age thirteen, case management, and medical assistance in accordance with regulations of the department, to enable an individual to participate pursuant to this title. Social services districts may continue such services for persons who lose eligibility for public assistance if funds for the activity are obligated or expended, or for up to ninety days if necessary or appropriate to assist individuals to become self-sufficient. In accordance with paragraph (f) of subdivision five of section one hundred thirty-one-a of this chapter, each district shall guarantee child care to each individual participating in work activities who requires child care to participate in such activities, attending orientation or an assessment in accordance with the requirements of this

title. Case management shall be provided for pregnant adolescents, adolescent parents and at-risk youth under eighteen years of age as required by title four-B of article six of this chapter. To the extent that resources permit, case management also shall be provided (in order of priority) to: persons identified in department regulations as at-risk youth, persons in the target populations defined in section three hundred thirty of this title, persons whose employability plan indicates a need for two or more concurrent activities and persons with limited English proficiency.

§ 332-b. Disability program

1. (a) Upon application and recertification for public assistance benefits, or whenever a district has reason to believe that a physical or mental impairment may prevent the individual from fully engaging in work activities, the social services district shall inquire whether the individual has any medical condition which would limit the individual's ability to participate in work activities pursuant to this title.

   (b) An individual who is eligible to receive comprehensive health services through a special needs plan defined in paragraph (m) or (n) of subdivision one of section three hundred sixty-four-j of this chapter, regardless of whether such a plan is operating in the individual's social services district of residence, shall be considered disabled and unable to engage in work activities or shall be considered work-limited.

2. (a) Under the circumstances set forth in subdivision one of this section, notice shall be provided to the individual of the opportunity to provide, within ten calendar days, any relevant medical documentation, including but not limited to drug prescriptions and reports of the individual's treating health care practitioner, if any; such documentation must contain a specific diagnosis as evidenced by medically appropriate tests or

evaluation and must particularize any work related limitations as a result of any such diagnosis.

(b) If, prior to submitting his or her medical documentation, the individual is referred to a health care practitioner certified by the office of disability determinations of the office of temporary and disability assistance or, if applicable, to the contracted agency or institution by or with which such health care practitioner is employed or affiliated for an examination pursuant to subdivision four of this section, such individual shall make best efforts to bring such documentation to the examination, and in no case shall provide such records to the examining health care practitioner certified by the office of disability determinations or, if applicable, to the contracted agency or institution by or with which such health care practitioner is employed or affiliated later than four business days after such examination; provided that the individual may demonstrate good cause as defined in regulations, for failure to provide such records within the specific time periods.

3. The district may in its sole discretion accept such documentation as sufficient evidence that the individual cannot fully engage in work activities and in such case shall modify work assignments consistent with the findings in such medical documents.

4. In instances where the district determines either that the documentation is insufficient to support an exemption from or limitation on work activities or that further medical evaluation is appropriate, the individual shall be referred to a health care practitioner certified by the Office of Disability Determinations of the Department of Social Services for an examination of such individual's medical condition.

The health care practitioner who performs the examination of the individual shall:

(a) review and consider all records or information provided by the individual or his or her treating health care

practitioner that are pertinent to the claimed medical condition;

(b) make a specific diagnosis as evidenced by medically appropriate tests or evaluations in determination of the individual's claimed condition;

(c) render to the individual and the social services district, an opinion, particularizing the presence or absence of the alleged condition; and

(d) In the event that he or she identifies a condition, other than the alleged condition, that may interfere with the individual's ability to fully engage in work activities, the practitioner shall report such condition; and

(e) determine whether the individual is:

(i) disabled and unable to engage in work activities pursuant to this title for a stated period of time, in which case the applicant shall be exempt in accordance with paragraph (a) of subdivision one of section three hundred thirty-two of this title;

(ii) for a stated period of time, not disabled, but work limited, and able to engage in work activities pursuant to this title, with stated limitations, or

(iii) neither disabled nor work limited.

5. When an applicant or recipient has requested or a social services official has directed a determination pursuant to this section, no assignment to work activities may be made until completion of such determination, unless the applicant or recipient agrees to a limited work assignment not inconsistent with the medical condition alleged by such person.

6. When an applicant or recipient receives notification of the examining medical professional's disability determination, he or she shall also be notified of his or her right to request a fair hearing within ten days of

such notice. If such applicant timely requests a fair hearing, no assignment to work activities pursuant to this title may be made pending such hearing and determination unless the applicant or recipient agrees to a limited work assignment not inconsistent with the medical condition alleged by such person. Provided, however, that if a social services district has reason to believe that such recipient or applicant does not actually suffer from a work limiting condition, the district shall provide the applicant or recipient with notice of potential sanctions pursuant to subdivision three of section three hundred forty-two of this title, and provided further that recipients will be subject to sanctions pursuant to subdivision three of section three hundred forty-two of this title if the district determines, based on clear medical evidence, that there is no basis for the individual's claim that he or she is unable to fully engage in work activities, and that the individual intentionally misrepresented his or her medical condition.

7. Any applicant or recipient determined to be work limited pursuant to this section may be assigned to work activities only in accordance with the limitations and protections set forth in paragraph (e) of subdivision five of section three hundred thirty-five-b of this title.

§ 333. Local plans and requirements

Each social services district shall submit to the commissioner for approval a biennial plan for the provision of education, work, training and supportive services related to the operation of work activity programs pursuant to this title.

Such plan shall be developed in cooperation and coordination with public and private education institutions, child care providers, child care resource and referral agencies if available in the district, labor unions, libraries, public and private employers, employment and training

agencies and organizations, and private industry councils established in service delivery areas defined in subdivision five of section nine hundred seventy-one of the executive law.

Such plan shall be generally available to the public for review and comment for a period of thirty days prior to submission to the commissioner. In accordance with department regulations and consistent with federal law and regulations, such plan shall include, but not be limited to, the following:

1. Estimates of the number of participants to be served;

2. A description of available supportive services as prescribed by section three hundred thirty-two-a of this title;

3. A description of the available activities under this title and the estimated capacity of such activities;

4. A description of the district's plan to meet federal requirements regarding participation and the district's criteria established pursuant to the provisions of paragraph (b) of subdivision two of section three hundred thirty- two of this title;

5. A list of education and training providers, such as job training partnership act agencies, educational agencies and other public agencies or private organizations with which the district expects to enter into agreements or contracts with a description of such contracts;

6. A description of the orientation to be provided to participants pursuant to section three hundred thirty-four of this title;

7. A description of the assessment tools chosen and the employee qualifications, district administrative unit or contracting entity that will be responsible for the assessments and the development of the employability plans;

8. A description of the conciliation procedures to be made available to participants pursuant to section three hundred forty-one of this title; and

9. Such additional information as is necessary to comply with federal requirements and to provide the report required under section three hundred thirty-nine of this title.

§ 334 Orientation

1. In accordance with department regulations, a social services district shall, at the time of application or redetermination, in writing and orally inform all public assistance applicants and recipients of the availability of activities and supportive services provided under this title for which they are eligible and of district or participant responsibilities, including:

(a) education, employment and training opportunities available under the local plan, including educational and training opportunities available at no cost to the participant as well as the responsibilities associated with the repayment of student financial aid;

(b) supportive services as prescribed by section three hundred thirty-two-a of this title; child care pursuant to section four hundred ten-u of this chapter for persons whose eligibility for assistance has terminated; and applicable medical assistance;

(c) the obligations of the district regarding the activities and supportive services to be provided;

(d) the rights, responsibilities and obligations of the participant in the program including, but not limited to, participation and the consequences of failure to participate in work activities without good cause;

(e) (1) the types and settings of child care services which may be reasonably accessible to participants and how such services shall be provided and financed;

(2) the assistance available to help participants select appropriate child care services; and

(3) the assistance available upon request to help participants obtain child care services.

2. A local social services official shall inform applicants for and recipients of public assistance of their responsibility to cooperate in establishing paternity and enforcing child support obligations.

3. Consistent with federal and state law and regulations, a local social services official shall, within one month of the recipient's participation in orientation, notify the recipient in writing of the opportunity to participate in the district's programs established under this title and provide a clear description of how to enter the programs.

§ 335. Assessments and employment to ability Plans for certain recipients in households with dependent children

1. Each social services official shall ensure that each recipient of public assistance who is a member of a household with dependent children and is eighteen years of age or older, or who is sixteen or seventeen years of age and is not attending secondary school and has not completed high school or a high school equivalency program, receives an assessment of employability based on his or her educational level, including literacy and English language proficiency, basic skills proficiency, child care

and other supportive services needs; and skills, prior work experience, training and vocational interests. This assessment shall include a review of family circumstances including a review of any special needs of a child. Such assessment shall be completed within ninety days of the date on which such person is determined eligible for public assistance. An applicant for or recipient of public assistance may be assigned to work activities prior to completion of such assessment.

2. (a) Based on the assessment required by subdivision one of this section, the social services official, in consultation with the participant, shall develop an employability plan in writing which shall set forth the services that will be provided by the social services official, including but not limited to child care and other services and the activities in which the participant will take part, including child care and other services and shall set forth an employment goal for the participant. To the extent possible, the employability plan shall reflect the preferences of the participant in a manner that is consistent with the results of the participant's assessment and the need of the social services district to meet federal and state work activity participation requirements, and, if such preferences cannot be accommodated, the reasons shall be specified in the employability plan. The employability plan shall also take into account the participant's supportive services needs, available program resources, local employment opportunities, and where the social services official is considering an educational activity assignment for such participant, the participant's liability for student loans, grants and scholarship awards. The employability plan shall be explained to the participant. Any change to the participant's employability plan required by the social services official shall be discussed with the participant and shall be documented in writing.

(b) Where an assessment indicates that a participant who is not subject to the education requirements of subdivision

four of section three hundred thirty-six-a of this title has not attained a basic literacy level, the social services official shall encourage and may require the participant to enter a program to achieve basic literacy or high school equivalency or to enter such educational programs in combination with other training activities consistent with the employability plan.

3. Each applicant for or recipient of public assistance as described herein must participate in an assessment as required by the social services district in accordance with the conditions of this section. Applicants who fail or refuse to participate with the requirements of this section shall be ineligible for public assistance. Recipients who fail or refuse to participate with the requirements of this section shall be subject to the sanctions set forth in section three hundred forty-two of this title.

4. A local social services official shall, pursuant to department regulations developed in consultation with the department of education, and the department of social services or its successor agencies use designated trained staff or contract with providers having a demonstrated effectiveness in performing assessments and developing employability plans to perform assessments and develop employability plans.

5. A social services district shall assign participants to activities pursuant to their employability plans to the extent that child care is guaranteed and other services as prescribed by section three hundred thirty-two-a of this title and section four hundred ten-u of this chapter are available. The district shall provide information to participants orally and in writing, as appropriate, regarding child care and the methods of payment therefor. Such information shall be sufficient for participants to make an informed decision regarding child care.

6. Nothing in this section shall be construed to prevent a social services official from providing an assessment more

detailed or comprehensive than the requirements set forth in this section.

§ 335-a. Assessments and employability plans for certain recipients in households without dependent children

1. To the extent resources are available, the social services official shall, within a reasonable period of time not to exceed one year following application and not to the exclusion of the assessment requirements of section three hundred thirty-five of this title, conduct an assessment of employability based on the educational level, including literacy and English language proficiency; basic skills proficiency; supportive services needs; and the skills, prior work experience, training and vocational interests of each participant. This assessment shall include a review of family circumstances.

2. (a) Based on the assessment required by subdivision one of this section, the social services official, in consultation with the participant, shall develop an employability plan in writing which shall set forth the services that will be provided by the social services official and the activities in which the participant will take part, including supportive services and shall set forth an employment goal for the participant. A local social services district may assign recipients in households without dependent children to any activity. The employability plan also shall take into account the participant's supportive services needs, available program resources, local employment opportunities, and where the social services official is considering an educational activity assignment for such participant, the participant's liability for student loans, grants and scholarship awards. The employability plan shall be explained to the participant. Any change to the participant's employability plan required by the social services official shall be discussed with the participant and shall be documented in writing.

(b) Where an assessment indicates that a participant who is not subject to the education requirements of this title has not attained a basic literacy level, the social services official shall encourage and may require the participant to enter a program to achieve basic literacy or high school equivalency or to enter such educational programs in combination with other training activities consistent with the employability plan.

3. A local social services official shall, pursuant to department regulations developed in consultation with the department of education and the department of social services or its successor agencies, use designated trained staff or contract with providers having a demonstrated effectiveness in performing assessments and developing employability plans to perform assessments and develop employability plans.

4. Each applicant for or recipient of public assistance as described herein must participate in an assessment as required by the social services district in accordance with the conditions of this section. Applicants who fail or refuse to participate with the requirements of this section shall be ineligible for public assistance. Recipients who fail or refuse to participate with the requirements of this section shall be subject to the sanctions set forth in section three hundred forty-two of this title.

5. A social services district shall assign participants to activities pursuant to their employability plans to the extent that supportive services including transportation are available.

6. Nothing in this section shall be construed to prevent a social services official from providing an assessment more detailed or comprehensive that the requirements set forth in this section.

§ 335-b. Mandatory work requirements

1. Each social services district shall meet or exceed the minimum participation rate for recipients of assistance

funded under the federal temporary assistance to needy families program participating in work activities as specified below with respect to families receiving such assistance. Each such district shall also meet or exceed the minimum participation rate for households without dependent children in which there is an adult who is not otherwise exempt from work requirements and which is receiving safety net assistance. Work activities for which such rates apply are described in section three hundred thirty-six of this title. Each social services district that fails to meet these rates shall be subject to the provisions of section one hundred fifty-three of this chapter.

(a) Such rate for all families receiving assistance funded under the federal temporary assistance to needy families program shall be as follows: for federal fiscal year nineteen hundred ninety-seven, twenty-five percent; nineteen hundred ninety-eight, thirty percent; nineteen hundred ninety-nine, thirty-five percent; two thousand, forty percent; two thousand one, forty- five percent; two thousand two and thereafter, fifty percent. Such rates shall apply unless the state is required to meet a different rate as imposed by the federal government, in which case such different rate shall apply in accordance with a methodology approved by the commissioner of labor.

(b) Such rate for (1) two-parent families receiving assistance funded under the federal temporary assistance to needy families program or (2) households without dependent children in which there is an adult who is not otherwise exempt receiving safety net assistance, shall be as follows: for federal fiscal years nineteen hundred ninety-seven and nineteen hundred ninety-eight, seventy-five percent; nineteen hundred ninety-nine and thereafter, ninety percent. Such rates shall apply unless the state is required to meet a different rate as imposed by the federal government, in which case such different rate shall apply in accordance with a methodology approved by the commissioner.

(c) Calculation of participation rates. The commissioner shall promulgate regulations which define the participation

rate calculation. Such calculation for families receiving assistance funded under the federal temporary assistance to needy families program pursuant to article N-A of the social security act shall be consistent with that established in federal law. The commissioner shall report annually, or as frequently as necessary to comply with federal requirements, to the commissioner of social services or the commissioners of successor agencies the average monthly participation rate for each social services district.

(d) Minimum work hours. In order for individuals to be included in the participation rates specified in this subdivision, such individuals must be engaged in work as defined in title,IV-A of the social security act and in this section for a minimum average weekly number of hours as specified below.

(i) For all families, if the month is in federal fiscal year: nineteen hundred ninety-seven and nineteen hundred ninety-eight, twenty hours per week; nineteen hundred ninety-nine, twenty-five hours per week; two thousand and thereafter, thirty hours per week.

(ii) For two-parent families or households without dependent children, in any federal or state fiscal year, thirty-five hours per week.

(iii) In the case of a two-parent family receiving federally funded child care assistance and a parent in the family is not disabled or caring for a severely disabled child, the individual and the other parent in the family are participating in work activities for a total of at least fifty-five hours per week during the month, not fewer than fifty hours of which are attributable to activities described in paragraphs (a) through (h) and (1) of subdivision one of section three hundred thirty-six of this title.

2. [Eff. until June 30, 2004, pursuant to L.2000, c. 534, § 5. See, also, subd. 2 below.] Engaged in work for a month shall mean participating in work activities identified in

subdivision one of section three hundred thirty-six of this title for the required number of hours specified in this section provided, however, that at least twenty hours of such participation, or thirty hours for two-parent families, or fifty hours for two-parent families receiving federally funded child care as set forth in subparagraph (iii) of paragraph (d) of subdivision one of this section, shall be attributable to the activities described in paragraphs (a) through (h) and (1) of subdivision one of section three hundred thirty-six of this title, or for households without dependent children at least thirty hours of participation shall be attributable to the activities set forth in paragraphs (a) through (e) of subdivision one of section three hundred thirty-six of this title, and further provided that participation in job search and job readiness assistance as identified in paragraph (f) of subdivision one of section three hundred thirty-six of this title shall only be determined as engaged in work for a maximum period of six weeks, only four of which may be consecutive as otherwise limited by federal law; and that individuals in all families and in two parent families may be engaged in work for a month by reason of participation in vocational training to the extent allowed by federal law. Any non-graduate student participating or approved by CUNY, SUNY or another degree granting institution, or any other state or local district approved education, training or vocational rehabilitation agency to participate in work-study, or in internships, externships, or other work placements that are part of the curriculum of that student, shall not be unreasonably denied the ability to participate in such programs and each hour of participation shall count toward satisfaction of such student's work activity requirements of this title provided that the district may consider, among other factors, (a) whether the student has voluntarily terminated his or her employment or voluntarily reduced his or her earnings to qualify for public assistance pursuant to subdivision ten of section one hundred thirty-one of this article; (b) whether a comparable job or on the job training position can reasonably be expected to exist in the private,

public or not-for-profit sector; (c) that the student has a cumulative C average or its equivalent, which may be waived by the district for undue hardship based on (1) the death of a relative of the student, (2) the personal injury or illness of the student, or (3) other extenuating circumstances; and (d) whether the institution cooperates in monitoring students attendance and performance and reports to the local social services department monthly on each student. Failure of the institution to monitor and report monthly to local social services districts on attendance and performance of the student's work study, internship, externship or other work placement shall be cause for the department to reasonably deny the student's ability to participate in such programs. Students shall be subject to sanctions equivalent to those associated with failure to adequately satisfy their other required work activities. Inassigning a non-graduate student participating in work-study, internships, externships or other work placements, pursuant to this section, to other work activities the district shall make reasonable effort to assign the student to hours that do not conflict with the student's academic schedule.

2. [Eff. June 30, 2004. See, also, subd. 5 above.] Engaged in work for a month shall mean participating in work activities identified in subdivision one of section three hundred thirty-six of this title for the required number of hours specified in this section provided, however, that at least twenty hours of such participation, or thirty hours for two-parent families, or fifty hours for two-parent families receiving federally funded child care as set forth in subparagraph (iii) of paragraph (d) of subdivision one of this section, shall be attributable to the activities described in paragraphs (a) through (h) and (1) of subdivision one of section three hundred thirty-six of this title, or for households without dependent children at least thirty hours of participation shall be attributable to the activities set forth in paragraphs (a) through (e) of subdivision one of section three hundred thirty-six of this title, and further provided that participation in job search and job readiness

assistance as identified in paragraph (f) of subdivision one of section three hundred thirty-six of this title shall only be determined as engaged in work for a maximum period of six weeks, only four of which may be consecutive as otherwise limited by federal law; and that individuals in all families and in two parent families may be engaged in work for a month by reason of participation in vocational training to the extent allowed by federal law.

3. For purposes of determining monthly participation rates under this section, a recipient in a one parent family who is the only parent or caretaker relative in the family of a child who has not attained six years of age is deemed to be engaged in work for a month if the recipient is engaged in work for an average of at least twenty hours per week during the month.

4. For the purposes of this section, a recipient who is married or a head of household and has not attained twenty years of age and who maintains satisfactory school attendance in accordance with federal requirements shall be deemed to be engaged in work to the extent allowed by federal law and regulations.

5. (a) Each parent or caretaker of a child, when such parent or caretaker is receiving public assistance, must be engaged in work as established by the social services district in accordance with the provisions of its local plan filed pursuant to section three hundred thirty-three of this title.

(b) Each social services official shall ensure that each parent or caretaker of a child, when such parent or caretaker is receiving benefits under the federal temporary assistance for needy families program, is required to be engaged in work as soon as practicable, but no later than twenty-four months (whether or not consecutive) from initial receipt of such assistance.

(c) Each social services official shall ensure that each parent or caretaker of a child, when such parent or

caretaker is receiving public assistance, is engaged in work as soon as practicable.

(d) Each social services official shall ensure that each adult member of a household without dependents, when such household is receiving public assistance is engaged in work as soon as practicable.

(e) Notwithstanding any other requirement of this section, individuals in receipt of public assistance and who are work limited in accordance with section three hundred thirty-two-b of this title shall be assigned to work activities in accordance with this title only if such assignment:

(i) is consistent with the individual's treatment plan and is determined to be appropriate by the social services official who is satisfied that such person is able to perform the work assigned and that such assignment will assist the individual's transition to self-sufficiency. In the event that such assignment is not part of the individual's treatment plan, the individual shall be deemed to be engaged in work as defined in this subsection if he or she is complying with the requirements of his or her treatment plan.

(ii) where no treatment plan exists, is consistent with the individual's mental and physical limitations.

(f) The social services district shall communicate to the person supervising the work assignment of a work limited recipient any limitations of the recipient.

6. Recipients of safety net assistance who are exempt or work limited pursuant to this title shall be determined to be engaged in work as defined by department regulation.

336. Work activities

1. Social services districts may provide, and require applicants for and recipients of public assistance to participate in a variety of activities, including but not limited to the following:

(a) unsubsidized employment;

(b) subsidized private sector employment;

(c) subsidized public sector employment;

(d) work experience in the public sector or non-profit sector, (including work associated with refurbishing publicly assisted housing) if sufficient private sector employment is not available;

(e) On-the-job training;

(f) job search and job readiness assistance, provided that job search is an active and continuing effort to secure employment configured by the local social services official;

(g) community service programs provided, however, the number of hours a participant in community service activities authorized pursuant to this section shall be required to work in such assignment shall not exceed a number which equals the amount of assistance payable with respect to such individual (inclusive of the value of food stamps received by such individual, if any) divided by the higher of (a) the federal minimum wage, or (b) the state minimum wage. No participant shall in any case be required to engage in assigned activities for more than forty hours in any week. No participant shall be assigned to a community service activity that conflicts with his or her bona fide religious beliefs;

(h) vocational educational training as time limited by federal law. For the purposes of this title, "vocational educational training" shall include but not be limited to organized educational programs offering a sequence of courses which are directly related to the preparation of individuals for current or emerging occupations requiring other than a baccalaureate or advanced degree. Such programs shall include competency-based applied learning which contributes to an individual's academic knowledge, higher-order reasoning, and problem-solving skills, work attitudes, general employability

skills, and the occupational-specific skills necessary for economic independence. Such term also includes applied technology education;

(i) job skills training directly related to employment;

(j) education directly related to employment, in the case of a recipient who has not yet received a high school diploma or a certificate of high school equivalency;

(k) satisfactory attendance at secondary school or a course of study leading to a certificate of general equivalency in the case of a recipient who has not completed secondary school or received such certificate;

(l) provision of child care services to an individual who is participating in community service;

(m) job search and job readiness assistance once the individual has exceeded the six week limit set in federal law;

(n) educational activities pursuant to section three hundred thirty-six-a of this title.

2. No participant shall be required to provide child care services as a work activity described in this section unless the participant expressly requests in writing to provide such services.

3. Social services districts may enter into agreements with public and private employment agencies to assist recipients of public assistance to find jobs.

4. No participant shall in any case be required to engage in assigned activities for more than forty hours in any week.

5. In no event shall the programs and activities enumerated in this title be deemed the sole activities that a social services district may provide and require applicants for and recipients of public assistance to engage in. Any program

or activity that meets the goals of this title and is consistent with the requirements of the labor law and this chapter shall be allowed.

6. Any social services district that establishes and provides a program or activity not herein enumerated shall set forth the requirements and structure of such program or activity in its local plan pursuant to the provisions of section three hundred thirty-three of this title.

7. In accordance with the provisions of paragraph (h) of subdivision two of section four hundred fifty-four of the family court act or as otherwise required by the court, the court may assign to work activities the non- custodial parents of children receiving public assistance and require a report to such court of any failure of said parent to comply with the requirements of such program.

8. [Eff. until June 30, 2004, pursuant to L.2000, c. 534, § 5.] The hours of participation in federal work study programs completed pursuant to section three hundred thirty-five-b of this title shall be included as a work activity within the definition of unsubsidized employment, subsidized private sector employment or subsidized public sector employment pursuant to paragraphs (a), (b) and (c) of subdivision one of this section, and the hours of participation in internships, externships and other work placements completed pursuant to section three hundred thirty-five-b of this title shall be included as a work activity within the definition of on-the-job training pursuant to paragraph (e) of subdivision one of this section.

336-a. Educational Activities

1. Social services districts shall make available vocational educational training and educational activities. Such activities may include but need not be limited to, high school education or education designed to prepare a participant for a high school equivalency certificate, basic and remedial education, education in English proficiency

and no more than a total of two years of post-secondary education (or the part-time equivalent if full-time study would constitute an undue hardship) in any of the following providers which meet the performance or assessment standards established in regulations by the commissioner for such providers: a community college, licensed trade school, registered business school, or a two-year college; provided, however, that such post-secondary education must be necessary to the attainment of the participant's individual employment goal as set forth in the employability plan and such goal must relate directly to obtaining useful employment in a recognized occupation.

2. When a district contracts with a proprietary vocational school to provide vocational educational training to participants, not more than twenty-five percent of the approved duration of the program shall be devoted to preparation for a high school equivalency diploma or instruction in English for students with limited proficiency in English. Participants needing instruction in basic literacy shall be referred to basic education programs. Instructors employed by proprietary schools to prepare a participant for a high school equivalency certificate or for education in English proficiency shall meet experience requirements established by the regulations of the commissioner of education.

3. When a participant is assigned to an appropriate vocational educational or educational activity and such activity is available at no cost to the social services district through the school district or board of cooperative educational services in which the participant resides or through another agency or organization providing educational services, the social services district shall refer the participant to such district, board, agency or organization.

4. To the extent provided in paragraphs (a) through (d) of this subdivision and if resources permit, each social services official shall assign to appropriate educational

activities any participant who has not obtained a high school diploma or its equivalent:

(a) In accordance with the provisions of this chapter, any such participant who is under age eighteen shall be required to attend educational activities designed to prepare the individual for a high school degree or equivalency certificate. Participants who are not subject to compulsory school attendance requirements may be exempted from the requirements of this paragraph under criteria established by the department in consultation with the state education department and consistent with federal law and regulations.

(b) Any such participant who is age eighteen or nineteen shall be assigned to educational activities, except that the district shall assign such participant to employment and/or other activities under this title if the district has determined that such alternative activities are consistent with the participant's employability plan and, pursuant to department regulations, there has been a determination by the district based on such plan that educational activities are not appropriate for such participant or that the participant has failed to make good progress in such educational activities.

(c) Any such participant who is an adult in a two-parent family and is under age twenty-five may be required to participate in educational activities consistent with his or her employment goals set forth in the employability plan.

(d) The social services official shall not assign a participant described in this subdivision to any activities which interfere with the educational activities assigned pursuant to such participant's employability plan and described in this subdivision.

5. Any applicant for or recipient of public assistance pursuing activities described in this subdivision shall not be assigned to any other activity prior to conducting an assessment and developing an employability plan as prescribed in section three hundred thirty-five or three

hundred thirty-five-a of this title. Local social services districts may periodically reevaluate a participant's employment plan and make assignments to other work activities in order to meet participation rates, giving due consideration to the participant's progress in the current, and if applicable, prior program.

6. Nothing required in this section shall be construed to supersede the eligibility requirements of teen parents as set forth in this chapter.

[§ 336-b. Revealed. L.1997, c. 436, vt. B, § 148, eff. Aug. 20, 19971]

§ 336-c Work experience

1. (a) Work experience programs meeting state and federal requirements may be established by social services districts.

(b) Work experience programs may include the performance of work for a federal office or agency, county, city, village or town or for the state or in the operation of or in an activity of a nonprofit agency or institution, in accordance with the regulations of the department.

2. A recipient may be assigned to participate in such work experience program only if:

(a) appropriate federal and state standards of health, safety and other work conditions are maintained;

(b) The number of hours a participant in work experience activities authorized pursuant to this section shall be required to work in such assignment shall not exceed a number which equals the amount of assistance payable with respect to such individual (inclusive of the value of food stamps received by such individual, if any) divided by the higher of (a) the federal minimum wage provided that such hours shall be limited as set forth in subdivision four of section three hundred thirty-six of this title, or (b) the state minimum wage;

(c) such recipients are provided appropriate workers' compensation or equivalent protection for on-the-job injuries and tort claims protection on the same basis, but not necessarily at the same benefit level, as they are provided to other persons in the same or similar positions, while participating in work experience activities under this section;

(d) the project to which the participant is assigned serves a useful public purpose in fields such as health, social services, environmental protection, education, urban and rural development and redevelopment, welfare, recreation, operation of public facilities, public safety, and child day care;

(e) such assignment would not result in (i) the displacement of any currently employed worker or loss of position (including partial displacement such as reduction in the hours of non-overtime work, wages or employment benefits) or result in the impairment of existing contracts for services or collective bargaining agreements; (ii) the employment or assignment of a participant or the filling of a position when any other person is on layoff from the same or any equivalent position or the employer has terminated the employment of any regular employee or otherwise reduced its workforce with the effect of filling the vacancy so created with a participant assigned pursuant to this section; (iii) any infringement of the promotional opportunities of any current employed person; or (iv) the performance, by such participant, of a substantial portion of the work ordinarily and actually performed by regular employees; or (v) the loss of a bargaining unit position as a result of work experience participants performing, in part or in whole, the work normally performed by the employee in such position;

(f) such assignment is not at any work site at which the regular employees are on a legal strike against the employer or are being subjected to lock out by the employer.

3. The public employer shall publish on a monthly basis a report summarizing the employer's work experience

program for the month. Such monthly report shall include, at a minimum, summary information regarding the agencies or departments where participants are assigned, work locations, job duties and assignments, hours worked and period worked and shall be provided to the certified collective bargaining representative and may not be disclosed to any other party. Such certified collective bargaining representative shall take reasonable steps to protect the confidentiality of such information and shall take reasonable steps to prevent disclosure of same to non-authorized persons. Every report provided pursuant to this section shall contain a warning against re-disclosure and asserting the confidentiality of the information therein provided.

4. [Eff. until June 30, 2004, pursuant to L.2000, c. 534, § 5. See, also, subd. 4 below.] In assigning a recipient who is a non-graduate student attending CUNY, SUNY or other approved non-profit education, training or vocational rehabilitation agency, the social services district must, after consultation with officials of CUNY, SUNY or other non-profit education, training or vocational rehabilitation agency, assign the student to a work site on campus, where the recipient is enrolled, and shall not unreasonably assign the student to hours that conflict with the student's academic schedule, if an approved work experience assignment is available. Where such work experience assignment is not available, the social services district shall, to the extent possible, assign the student to a work site within reasonable proximity to the campus where the recipient is enrolled and shall not unreasonably assign the student to hours that conflict with the student's academic schedule. Provided, however, in order to qualify for a work experience assignment on-campus, or in close proximity to campus, a student must have a cumulative C average, or its equivalent. The district may waive the requirement that the student have a cumulative C average or its equivalent for undue hardship based on: (i) the death of a relative of the

student; (ii) the personal injury or illness of the student; or (iii) other extenuating circumstances.

4. [Eff. June 30, 2004. See, also, subd. 4 above.] In assigning a recipient who is a student attending CUNY, SUNY or other approved non-profit education, training or vocational rehabilitation agency, the social services district must, after consultation with officials of CUNY, SUNY or other non-profit education, training or vocational rehabilitation agency, assign the student to a work site on campus, where the recipient is enrolled, if an approved work experience assignment is available. Where such work experience assignment is not available, the social services district shall, to the extent possible, assign the student to a work site within reasonable proximity to the campus where the recipient is enrolled. Provided, however, in order to qualify for a work experience assignment on-campus, or in close proximity to campus, a student must have a cumulative C average, or its equivalent. The district may waive the requirement that the student have a cumulative C average or its equivalent for undue hardship based on: (i) the death of a relative of the student; (ii) the personal injury or illness of the student; or (iii) other extenuating circumstances.

336-d. Job search activities

1. Each applicant for or recipient of public assistance shall, upon request of the social services official, demonstrate that he or she is engaged in an active and continuing effort to achieve self-sufficiency as defined by the department. Such effort shall include but not be limited to an active and continuing search for employment, or for persons otherwise exempt in accordance with section three hundred thirty-two of this title, and where deemed appropriate by the social services official, activities that foster preparation for employment. Each such applicant or recipient shall have an affirmative duty to accept any offer of lawful employment in which he or she may engage. The failure of a social services district to assign applicants and recipients to

activities pursuant to this title shall not relieve such persons from the requirements of this section. An individual who fails to comply with the requirements of the section shall be subject to the provisions set forth in subdivision five of section one hundred thirty-one of this chapter and of section three hundred forty-one and three hundred forty-two of this title.

2. The social services official shall, if deemed appropriate by such official, supervise job search activities assigned pursuant to this article.

4 336-e. Subsidized public sector employment programs

1. A social services district may establish subsidized public sector employment programs for public assistance recipients including, but not limited to, grant diversion programs, which may be supported wholly or in part with public assistance funds. Such programs shall be established through agreements between local districts and employers; provided, however, that, if appropriate, the department may act on behalf of one or more local districts in establishing such agreements.

2. Programs may include, but need not be limited to, on-the-job training programs which reimburse employers for the cost of training public assistance recipients through wage subsidies.

3. The social services official or the department is authorized to transfer public assistance funds to employers through written agreements developed and executed in accordance with department regulations.

4. A recipient may be assigned to a subsidized public sector employment activity only if:

(a) the conditions of employment including such factors as the type of work, geographical region and proficiency of the participant are appropriate and reasonable.

(b) the recipient is deemed an employee for purposes of the applicable collective bargaining and labor laws and receives the same benefits and protections as existing employees similarly situated (working a similar length of time and doing similar work) receive pursuant to the provisions of law, and applicable collective bargaining agreement or otherwise as made available to the regular employees of the employer. Each participating person shall be given the opportunity to work sufficient hours to earn a net wage of at least the amount such person would have been entitled to receive as recipients of public assistance or, where applicable, the amount such person would have received for his or her household, including the amount for dependents. Such net wage shall be calculated by deducting from gross wages federal income taxes, federal employment taxes, state income taxes, local income taxes and union dues, if any. No program shall be approved under this section unless the commissioner is satisfied that it contains adequate provisions for the prompt resolution of disputes concerning participation in the program and the obligations and benefits associated with it. Nothing contained in this section shall be deemed to affect, modify or abridge a participant's right to a fair hearing pursuant to section twenty-two of this chapter or representation thereat by counsel or, if applicable, the participant's collective bargaining representative.

(c) a participant employed by an employer subject to the civil service law or subject to rules consistent with such law is appointed to an appropriate classified position. Notwithstanding any other provision of law, rule or regulation, such position shall be deemed to be in the non-competitive class of the classified service only while such participant is serving in the position.

(d) no employee of the participating employer is displaced by any recipient employed pursuant to this section. For the purpose of this subdivision, the term displacement shall include partial displacement, such as a reduction in the customary hours of work (including overtime), wages, or employment benefits.

(e) no participant shall be employed:

(i) if any other employee of the employer is available for reinstatement, recall or reemployment following a leave of absence, furlough, layoff or suspension from the same or any substantially equivalent job;

(ii) when the employer has terminated the employment of any regular employee or otherwise reduced its work force with the intention of filling the vacancy or vacancies so created by hiring a participant whose wages are subsidized under this program; or

(iii) when the employee organization representing employees of the employer is engaged in a strike against the employer or such employees have been locked-out by the employer; or

(iv) where such employment results in the loss of a bargaining unit position as a result of work experience participants performing, in part or in whole, the work normally performed by the employee in such position.

(t) no position is created that will infringe in any way upon the promotional opportunities of currently employed individuals or individuals currently engaged in an approved apprenticeship training program.

(g) no participant shall remain in a position if another employee is eligible for promotion from an eligible list to that position. An employer shall, at least ten days prior to filling a position with a participant, notify any employee organization that represents employees who are engaged in similar work or training in the same or substantially equivalent job as that in which the placement is to be made, that it intends to make a placement pursuant to the terms of this section.

(h) where an employee organization represents employees who are engaged in similar work in the same or substantially equivalent job as that proposed to be funded under this program, an

opportunity is provided for such organization to comment on the proposed placement of a participant or the administration of the program and the social services official or his or her designee shall respond to such comments within ten days of. receipt thereof.

(i) employers are prohibited from using public assistance funds to encourage or discourage membership in, or participation in the activities of, any employee organization and each employer provides to the social services district assurances that no such funds will be used for such purposes.

(j) nothing herein shall be construed to affect, modify or otherwise abridge any provision of the civil service law.

§ 336-f. Subsidized private sector and not-for-profit employment programs

1. A social services district may establish subsidized private sector employment programs for public assistance recipients including, but not limited to, grant diversion programs, which may be supported wholly or in part with public assistance funds. Such programs shall be established through agreements between local districts and employers, including not for profit employers; provided, however, that, if appropriate, the department may act on behalf of one or more local districts in establishing such agreements.

2. Programs may include, but need not be limited to, on-the-job training programs which reimburse employers for the cost of training public assistance recipients through wage subsidies.

3. The social services official or the department is authorized to transfer public assistance funds to employers through written agreements developed and executed in accordance with department regulations.

4. A recipient may be placed in a subsidized private sector or not-for-profit employment activity only if:

(a) the conditions of employment including such factors as the type of work to be performed, the geographic location of the job, and the qualifications of the participant are appropriate and reasonable.

(b) the recipient is deemed an employee for purposes of the applicable collective bargaining and labor laws and receives the same benefits and protections as an employee similarly situated (working a similar length of time and doing similar work) receives pursuant to the provisions of law, an applicable collective bargaining agreement or otherwise as made available to the employees of the employer.

(c) no employee of the participating employer is displaced by any recipient hired pursuant to this section. For the purpose of this subdivision, the term displacement shall include partial displacement, such as a reduction in the customary hours of work (including overtime), wages, or employment benefits.

(d) no participant shall be hired:

(i) if any other employee of the employer is available for reinstatement, recall or reemployment following a leave of absence, furlough, layoff or suspension from the same or any substantially equivalentjob; or

(ii) when the employer has terminated the employment of any regular employee or otherwise reduced its work force with the intention of filling the vacancy or vacancies so created by hiring a participant whose wages are subsidized under this program; or

(iii) when the employee organization representing employees of the employer is engaged in a strike against the employer or such employees have been locked-out by the employer; or

(iv) when such hiring will result in the loss of a bargaining unit position as a result of work experience participants performing, in part or in whole, the work normally performed by the employee in such position.

(e) no job is created that will infringe in any way upon the promotional opportunities of current employees or individuals currently engaged in an approved apprenticeship training program.

(t) no participant shall remain in a job if another employee is eligible for promotion to that job. An employer shall, at least ten days prior to filling a position with a participant, notify any employee organization that represents employees who are engaged in similar work or training in the same or substantially equivalent jobs as those in which the placement is to be made, that it intends to make a placement pursuant to the terms of this section.

(g) where an employee organization represents employees who are engaged in similar work in the same or substantially equivalent jobs as those proposed to be funded under this program, an opportunity is provided for such organization to comment on the proposed placement of a participant or the administration of the program and the social services official or his or her designee shall respond to such comments within ten days of receipt thereof.

(n) employers are protubtted from using public assistance funds to encourage or discourage membership in, or participation in the activities of, any employee organization and each employer provides to the social services district assurances that no such funds will be used for such purposes.

5. The social services district shall require every private or not-for-profit employer that intends to hire one or more work activity participants to certify to the district that such employer has not, in the past five years, been convicted of a felony or a misdemeanor the underlying basis of which involved workplace safety and health or labor standards.

Such employer shall also certify as to all violations issued by the department of labor within the past five years. The social services official in the district in which the participant is placed shall determine whether there is a pattern of violations sufficient to render the potential employer ineligible. Employers who submit false information under this section shall be subject to criminal prosecution for filing a false instrument.

[§§ 336-g, 336-h Repealed. L.1997, c. 436, pt. B, § 148, eff. Aug. 20, 1997.]

§ 337. Responsibilities of state departments and agencies.

1. Notwithstanding any provision of this chapter to the contrary, responsibility for the operation and administration of work, employment and training programs in connection with the programs administered pursuant to this chapter shall be vested in the commissioner subject to regulations, procedures and instructions of the department.

2. The department is authorized to enter into agreements with any state agency, social services district or other entity for performance of activities authorized under this title.

§ 338. Cooperation of state departments

There shall be such cooperative agreements and arrangements between and among the department, the state department of social services or its successor agency, the state department of education and other appropriate state departments as shall be necessary to assure compliance with federal and state requirements or requirements of this title relating to employment programs for applicants of and recipients of public assistance and to assure that the purposes *of such* program will be effectively accomplished. The purpose *of such* arrangements is to promote interagency planning, coordinate service delivery and identify needed resources for the implementation of *such* employment programs.

§ 339. Reports

The commissioner shall require, from each social services district, information and reports sufficient and timely to enable the state to meet all federal reporting requirements.

§-340. Technical assistance

The commissioner shall provide technical assistance to social services districts in the development, implementation and administration of plans described in section three hundred thirty-three of this title.

The department shall monitor the implementation and ongoing operation of the programs pursuant to this title. Such monitoring shall include review of sample cases to assess compliance with applicable state and federal statutes and regulations.

§ 341. Conciliation; refusal to participate

1. Consistent with federal law and regulations and this title, if a participant has failed or refused to comply with the requirements of this title, the social services district shall issue a notice indicating that such failure or refusal has taken place and of the right of such participant to conciliation to resolve the reasons for such failure or refusal. The notice shall indicate that the participant has seven days to request conciliation with the district regarding such failure or refusal in the case of a safety net participant and ten days in the case of a family assistance participant. If the participant does not contact the district within the specified number of days, the district shall issue ten days notice of intent to discontinue or reduce assistance, pursuant to regulations of the department. Such notice shall also include a statement of the participant's right to a fair hearing relating to such discontinuance or reduction. If such participant contacts the district within seven days in the case of a safety net participant or within ten days in the case of a family assistance participant, it will be the

responsibility of the participant to give reasons for such failure or refusal. Unless the district determines as a result of such conciliation process that such failure or refusal was willful and was without good cause, no further action shall be taken. If the district determines that such failure or refusal was willful and without good cause, the district shall notify such participant in writing by issuing ten days notice of its intent to discontinue or reduce assistance, including the reasons for such determination and the right to a fair hearing relating to such discontinuance or reduction. Unless extended by mutual agreement of the participant and the district, conciliation shall terminate and a determination shall be made within fourteen days of the date a request for conciliation is made in the case of a safety net participant or within thirty days of the conciliation notice in the case of a family assistance participant.

2. (a) The department shall establish in regulation a conciliation procedure for the resolution of disputes related to an individual's participation in programs pursuant to this title.

(b) The district shall contract with an independent entity, approved by the department, or shall use designated trained staff at the supervisory level who have no direct responsibility for the participant's case to mediate disputes in the conciliation conference. If no such supervisory staff or independent entity is available, the district may designate another trained individual, who has no direct responsibility for the participant's case to mediate disputes in the conciliation conference.

(c) If a participant's dispute cannot be resolved through such conciliation procedure, an opportunity for a fair hearing shall be provided. No sanction relating to the subject dispute may be imposed during the conciliation process.

3. When any family assistance participant required to participate in work activities fails to comply with the provisions of this title, the social services district shall take such actions as prescribed by appropriate federal law and regulation and this title.

4. When any safety net participant required to participate in work activities fails to comply with the provisions of this title, the social services district shall deny assistance to such participant in accordance with section three hundred forty-two of this title.

5. (a) To the extent that federal law requires, a social services district shall provide to those family assistance participants whose failure to comply has continued for three months or longer a written reminder of the option to end a sanction after the expiration of the applicable minimum sanction period by terminating the failure to comply as specified in subdivision three of this section. Such notice shall advise that the participant may immediately terminate the first or second sanction by participating in the program or accepting employment and that any subsequent sanction after six months have elapsed may be terminated by participating in the program or accepting employment.

(b) A social services district shall provide to those safety net participants whose failure to comply has continued for the length of the sanction period or longer a written reminder of the option to end a sanction after the expiration of the applicable minimum sanction period by terminating the failure to comply as specified in subdivision four of this section.

6. Consistent with federal law and regulation, no action shall be taken pursuant to this section for failure to

participate in the program or refusal to accept employment if:

(a) child care for a child under age thirteen (or day care for any incapacitated individual living in the same home as a dependent child) is necessary for an individual to participate or continue participation in activities pursuant to this title or accept employment and such care is not available and the social services district fails to provide such care;

(b) (1) the employment would result in the family of the participant experiencing a net loss of cash income; provided, however, a participant may not claim good cause under this paragraph if the social services district assures that the family will not experience a net loss of cash income by making a supplemental payment;

(2) net loss of cash income results if the family's gross income less necessary work-related expenses is less than the cash assistance the participant was receiving at the time the, offer of employment is made; or

(c) the participant meets other grounds for good cause set forth by the department in its implementation plan for this title which, at a minimum, must describe what circumstances beyond the household's control will constitute "good cause".

§ 342. Noncompliance with the requirements of this title

1. In accordance with the provisions of this section an individual who is required to participate in work activities shall be ineligible to receive public assistance if he or she fails to comply, without good cause, with the requirements of this title. Such ineligibility shall be for the amount and periods specified in this section. Good cause for failing to comply with the requirements of this title shall be defined in department regulations, provided, however, that the parent or caretaker relative of a child under thirteen years of age shall not be subject to the ineligibility provisions of

this section if the individual can demonstrate, in accordance with the regulations of the office of children and family services department, that lack of available child care prevents such individual from complying with the work requirements of this title. The parent or caretaker relative shall be responsible for locating the child care needed to meet the work requirements; provided, however, that the relevant social services district shall provide a parent or caretaker relative who demonstrates an inability to obtain needed child care with a choice of two providers, at least one of which will be a regulated provider.

2. In the case of an applicant for or recipient of public assistance who is a parent or caretaker of a dependent child the public assistance benefits otherwise available to the household of which such individual is a member shall be reduced pro-rata:

(a) for the first instance of failure to comply without good cause with the requirement of this article until the individual is willing to comply;

(b) for the second instance of failure to comply without good cause with the requirements of this article, for a period of three months and thereafter until the individual is willing to comply;

(c) for the third and all subsequent instances of failure to comply without good cause with the requirements of this article, for a period of six months and thereafter until the individual is willing to comply.

3. In the case of an individual who is a member of a household without dependent children applying for or in receipt of safety net assistance the public assistance benefits otherwise available to the household of which such individual is a member shall be reduced pro-rata:

(a) for the rust such failure or refusal, until the failure or refusal ceases or ninety days, which ever period of time is longer;

(b) for the second such failure or refusal, until the failure ceases or for one hundred fifty days, whichever period of time is longer; and

(c) for the third and all subsequent such failures or refusals, until the failure ceases or one hundred eighty days, whichever period of time is longer.

4. A recipient of public assistance who quits or reduces his hours of employment without good cause shall be considered to have failed to comply with the requirements of this article and shall be subject to. the provisions of this section.

5. A person described in paragraph (b) of subdivision seven of section one hundred fifty-nine of this chapter may not be sanctioned if his or her failure to comply with requirements of this title are related to his or her health status.

CODE OF FEDERAL REGULATIONS

TITLE 20--EMPLOYEES' BENEFITS

CHAPTER V--EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR

PART 645--PROVISIONS GOVERNING WELFARE-TO-WORK GRANTS

SUBPART B--GENERAL PROGRAM AND ADMINISTRATIVE REQUIREMENTS

Sec. 645.255 What nondiscrimination protections apply to participants in Welfare-to-Work programs?

(a) All participants in WtW programs under this part shall have such rights as are available under all applicable Federal, State and local laws prohibiting discrimination, and their implementing regulations, including:

(1) The Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.);

(2) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794);

(3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.); and

(4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).

(b) Participants in work activities, as defined in section 407(a) of the Social Security Act, operated with WtW funds, shall not be discriminated against because of gender. Participants alleging gender discrimination may file a complaint using the State's grievance system procedures as described in Sec. 645.270 of this subpart (section 403(a)(5)(J)(iii)) of the Act). Participants alleging gender discrimination in WtW programs conducted by One-Stop partners as part of the One-Stop delivery system may file a complaint using the complaint processing procedures developed and published by the State in accordance with the requirements of 29 CFR 37.70-37.80.

(c) Complaints alleging discrimination in violation of any applicable Federal, State or local law, such as Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Pregnancy Discrimination Act (42 U.S.C. 2000e (paragraph k)), or Section 188 of the Workforce Investment Act of 1998 (29 U.S.C. 2938), as well as those listed in paragraph (a) of this section, shall be processed in accordance with those laws and the implementing regulations.

(d) Questions about or complaints alleging a violation of the nondiscrimination laws in paragraph (a) of this section may be directed or mailed to the Director, Civil Rights Center, U.S. Department of Labor, Room N-4123, 200

Constitution Avenue, NW, Washington, D.C. 20210 for processing.

CODE OF FEDERAL REGULATIONS

TITLE 45--PUBLIC WELFARE

SUBTITLE B--REGULATIONS RELATING TO PUBLIC WELFARE

CHAPTER II--OFFICE OF FAMILY ASSISTANCE (ASSISTANCE PROGRAMS), ADMINISTRATION FOR CHILDREN AND FAMILIES, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 260--GENERAL TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) PROVISIONS

SUBPART A--WHAT RULES GENERALLY APPLY TO THE TANF PROGRAM?

§ 260.35 What other Federal laws apply to TANF?

(a) Under section 408(d) of the Act, the following provisions of law apply to any program or activity funded with Federal TANF funds:

(1) The Age Discrimination Act of 1975;

(2) Section 504 of the Rehabilitation Act of 1973;

(3) The Americans with Disabilities Act of 1990; and

(4) Title VI of the Civil Rights Act of 1964.

(b) The limitation on Federal regulatory and enforcement authority at section 417 of the Act does not limit the effect of other Federal laws, including Federal employment laws (such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA) and unemployment insurance (UI)) and nondiscrimination laws.

These laws apply to TANF beneficiaries in the same manner as they apply to other workers.

(2)

04-464

IN THE

Supreme Court of the United States

CITY OF NEW YORK, JASON TURNER, individually and in his capacity as Commissioner of New York City Human Resources Administration, GEORGE SANTIAGO, in his individual capacity,

Petitioners,

—v.—

UNITED STATES OF AMERICA, NORMA COLON, MARIA E. GONZALEZ, TAMMY AUER, THERESA CALDWELL-BENJAMIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT TAMMY AUER'S BRIEF IN OPPOSITION

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January 5, 2005

QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 authorizes employees to sue their employers for sexual and racial discrimination and harassment in the workplace. The questions presented are:

1) Whether workers in New York City's work experience program established under the 1996 welfare reform law can qualify as "employees" under the common law agency principles that govern employee status under Title VII.

2) Whether Title VII was impliedly preempted by the non-discrimination provision in the 1996 welfare reform law.

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STATEMENT OF THE CASE

A. Nature of the Case

The respondents are suing the City of New York (the "City") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the federal law that prohibits employment discrimination on the basis of race, sex, religion or national origin. The four individual respondents allege that they were sexually or racially harassed in violation of Title VII while working for the City in exchange for their welfare benefits in a work experience program established by the City under the 1996 federal welfare reform law. The City moved under Fed. R. Civ. P. 12 (b)(6) to dismiss respondents' claims, contending that respondents are not covered by Title VII. It now challenges an interlocutory decision by the court of appeals vacating the district court's dismissal. The City petitions for review of the interlocutory holding that a work experience program worker can qualify as an "employee" under the Title VII employee standard, an issue that no other federal court of appeals has addressed. The City also petitions for review of the interlocutory holding that Title VII was not impliedly preempted by the non-discrimination provision in the 1996 welfare law, likewise an issue that no other court of appeals has addressed.

B. PRWORA – The 1996 Welfare Reform Law

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996), ended the previous program for assisting needy families, Aid to Families With Dependent Children, and authorized the new work-focused Temporary Assistance to Needy

Families (TANF) program, codified at 42 U.S.C. § 601 et seq. PRWORA requires states to ensure that certain percentages of TANF families participate in "work activities." 42 U.S.C. § 607(a). PRWORA specifies twelve permissible work activities, 42 U.S.C. §§ 607(d)(1)-(d)(12), Petitioners' Appendix ("Pet. App.") A155, including "work experience . . . if sufficient private sector employment is not available," 42 U.S.C. § 607(d)(4), Pet. App. A155. When an individual refuses to participate in a work activity, PRWORA requires the state to "(A) reduce the amount of assistance otherwise payable to the family pro rata (or more, at the option of the State) . . . ; or (B) terminate such assistance." 42 U.S.C. § 607(e)(1), Pet. App. A156.

C. The New York City Work Experience Program

In New York State, the PRWORA program is operated by local social services districts, one of which is New York City, subject to rules set by state statute and regulation. In 1997, New York State enacted a welfare reform law to implement PRWORA, 1997 N.Y. Laws, ch. 436, authorizing the creation of programs of "work experience in the public sector or non-profit sector ... if sufficient private sector employment is not available." N.Y. Soc. Serv. Law § 336(1)(d), Pet. App. A254. In response to this state statute, New York City created the Work Experience Program (WEP) at issue in this case. Under the state law, the City must calculate the maximum required number of hours of WEP work by dividing the recipient's welfare grant by the applicable minimum wage. N.Y. Soc. Serv. Law § 336-c(2)(b), Pet. App. A259. WEP workers must be "provided appropriate workers' compensation or equivalent protection for on-the-job injuries and tort claims protection on the same basis, but not necessarily at the same benefit level, as they

are provided to other persons in the same or similar positions," and "the project to which the participant is assigned [must be one that] serves a useful public purpose." N.Y. Soc. Serv. Law §§ 336-c(2)(c)&(d), Pet. App. A260. WEP workers must also be reimbursed for their authorized child care and transportation expenses. N.Y. Soc. Serv. Law § 332-a, Pet. App. A236. A recipient who refuses to work incurs a pro rata reduction of her household's grant, *i.e.*, if the refusing recipient is a single parent with one child, the household's grant is cut in half. N.Y. Soc. Serv. Law § 342, Pet. App. A273-74.

D. Respondent Tammy Auer

In 1997, the New York City welfare agency assigned respondent Tammy Auer to perform general office work at the New York City Sanitation Department. As summarized by the court of appeals, her complaint alleges that she was sexually harassed by her Sanitation Department supervisor over the period of approximately eighteen months that she worked for the department, with the harassment including repeated sexually charged comments and invitations and inappropriate touching. Pet. App. A7-8. Ms. Auer filed a complaint with the Equal Employment Opportunity Commission (EEOC), which, after finding reasonable cause to believe her allegations were true, referred her charge to the United States Department of Justice. *Id.* at A8.

E. District Court Proceedings

In May 2001, the United States brought a lawsuit against New York City alleging violations of Title VII, acting on behalf of Tammy Auer, Maria Gonzalez, Theresa Caldwell-Benjamin, and a fourth WEP worker who subsequently settled her claims and is no longer a

party to the action. Each of these women moved to intervene in the government's lawsuit. Respondent Auer's motion was granted with respect to her Title VII claim on July 23, 2004. *See* Rec. Doc. 39 at 2. In September 2001, Norma Colon, also a WEP worker, filed a separate lawsuit against the City alleging violations of Title VII.

The City moved to dismiss both lawsuits pursuant to Rules (12)(b)(1) and (12)(b)(6) of the Federal Rules of Civil Procedure. The City argued that WEP workers cannot be employees within the meaning of Title VII because they are not remunerated for their work, and that, assuming that WEP workers could satisfy the Title VII employee standard, PRWORA had impliedly preempted Title VII from applying to PRWORA work experience workers. The district court consolidated the lawsuits for the purpose of hearing and deciding the motions to dismiss. The district court assumed that jurisdiction existed and resolved the consolidated motions under Rule 12(b)(6). In an unpublished opinion and order dated March 8, 2002, Pet. App. A55, the district court granted the dismissal motions, holding that WEP workers cannot be employees under Title VII because they are not remunerated for their work. The district court did not reach the question of whether PRWORA had preempted Title VII.

F. Court of Appeals Proceedings

On February 13, 2004, the Second Circuit Court of Appeals vacated the district court's judgment and remanded the case for further proceedings with one judge dissenting. Pet. App. A1-52.

Concerning the Title VII employee standard, the court of appeals explained that under Second Circuit precedent, employee status is determined by a two-part test. *Id.* at A15. First, the putative employee must establish that she received remuneration from the putative employer in some form for her work, which need not be a salary but must consist of "substantial benefits not merely incidental to the activity performed." *Id.* (quoting *York v. Ass'n of the Bar*, 286 F.3d 122, 126 (2d Cir.), *cert. denied*, 537 U.S. 1089 (2002)). Second, if the putative employee establishes receipt of remuneration, employee status is then determined by applying the common law of agency factors articulated by this Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989). *Id.*

The court of appeals held that the district court had erred by finding as a matter of law that the plaintiff WEP workers were not remunerated for their work. *Id.* at A4. The court of appeals reasoned that plaintiffs' allegations of the receipt of benefits for their work including their cash assistance, their eligibility for workers' compensation, and their reimbursement for child care and transportation expenses would, if true, suffice to establish remuneration. *Id.* at A16. The court of appeals also noted that its conclusion was supported by the EEOC's interpretation of Title VII. *Id.* at A17-18.

Concerning PRWORA preemption, the court of appeals concluded that the City had not demonstrated the clear expression of congressional intent to preempt Title VII that is required to establish that one federal statute has impliedly preempted another. *Id.* at A35. The court of appeals rejected several arguments in support of preemption that the petitioners no longer advance, as well as the "expressio unius est exclusio alterius" argument

that the City renews here. *Id.* at A27-31. The court of appeals noted that its conclusion was supported by the federal agencies' interpretations of PRWORA and by PRWORA's legislative history. *Id.* at A31-35.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

None of the usual criteria that this Court applies in determining whether to exercise its certiorari jurisdiction favors review of the decision below. First, the case is in an interlocutory posture. Second, the alleged conflicts with other court decisions asserted by petitioners do not exist. Third, the City advances no compelling reason for granting certiorari. Fourth, review by this Court might have no prospective effect as Congress has not yet decided whether and in what form the TANF program at issue in this case will continue beyond March 31, 2005. Moreover, the court of appeals decision was correct.

I. None of the Usual Criteria That This Court Applies in Determining Whether to Exercise its Certiorari Jurisdiction Favors Review of the Decision Below

A. Review would be premature because the decision below is interlocutory

The court of appeals decision is interlocutory in nature. This Court has repeatedly stated that it "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where the court of appeals has resolved the merits of the case and only the "determination of an appropriate remedy" remains. *Virginia Military Inst. v. United States*, 508 U.S.

946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari); *see also, e.g.*, *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case" making it "not yet ripe for review by this Court.")

The decision below is not interlocutory in a merely technical sense. The court of appeals reviewed the district court's dismissal of the case "accepting all of the plaintiff's allegations as true and drawing all inferences in a manner favorable to the plaintiff," Pet. App. A14, and held only that "the allegations of plaintiffs' complaints sufficiently pleaded the individual plaintiffs' status as employees entitled to Title VII's protection." *Id.* at A36. On remand, the final results of the case might effectively moot the issues on which the City seeks review if the respondents are unable to prove their allegations, or if the City successfully advances other defenses that would preclude respondents from obtaining relief.

B. The alleged conflicts with other court decisions asserted by petitioners do not exist

1. The court of appeals decision does not conflict with the decision of another federal court of appeals on the same matter

This Court may grant certiorari when a court of appeals decision is "in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). In their "Question Presented," petitioners assert a conflict with two other federal court of appeals decisions, *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), *cert. denied*, 522 U.S. 1114 (1998), and *Johns v. Stewart*, 57 F.3d 1544 (10th Cir.

1995). However, these cases did not involve the applicability of Title VII to work experience workers, and consequently did not decide the "same important matter." Moreover, *O'Connor* was, like the instant case, a Second Circuit decision, not the decision of "another" court of appeals, and this Court does not grant certiorari to resolve alleged intracircuit conflicts. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Furthermore, both *O'Connor* and *Johns* are also otherwise distinguishable.

In *O'Connor*, a college student performed field work at a psychiatric hospital and received federal work study funding from the college she attended but no payments from the hospital. 126 F.3d at 113. She sued the hospital, the state that operated the hospital, and her hospital supervisor, who allegedly had sexually harassed her. *Id.* at 114. The Second Circuit held that the student did not qualify as a Title VII employee because she received no remuneration from the putative employer, the psychiatric hospital. *Id.* at 116. In contrast, in this case, as the court of appeals noted, Pet. App. A22, New York City -- the putative employer -- is both the payor and the recipient of the WEP workers' services, and thus the rationale of *O'Connor* does not apply.

In *Johns*, two welfare recipients who had participated in the work component of a Utah public assistance program sued the state welfare agency. They asserted that they had been required to work more than the number of hours determined by dividing their grant by the minimum wage in alleged violation of the requirements of the Fair Labor Standards Act (FLSA). *Johns*, 57 F.3d at 1551. The Tenth Circuit held that the plaintiffs were not protected by the FLSA because they were not "employees" within the meaning of the FLSA. In reaching this conclusion, the court of appeals applied

an "economic reality" test that focused "upon the circumstances of the whole activity." *Id.* at 1558-59 (citation omitted). The court of appeals reasoned that work was but "one component" of Utah's comprehensive public assistance plan, and that the overall relationship between the recipients and the welfare agency was an assistance relationship, not an employment relationship. *Id.* at 1559. (Notably, even the work component included not only community work, but also adult education and skills training. *Id.* at 1550.)

Johns is clearly distinguishable from the instant case. First, it did not involve Title VII. Second, the Utah work program antedated PRWORA and was not governed by PRWORA. *Cf. Frank v. United States*, 506 U.S. 932 (1992) (Stevens, J., respecting the denial of certiorari) ("[T]he Court's action is supported by the fact that a square conflict between two Courts of Appeals has not arisen since the enactment of the 1984 statute, and by the Court's normal practice of awaiting such a conflict before considering the significance of new federal legislation.") Third, even as to the FLSA, *Johns* predated the United States Department of Labor (DOL) Guide, issued following enactment of PRWORA, which states that the FLSA can apply to workers in welfare work programs, the first known DOL statement on this matter (discussed *infra* at p. 19). The *Johns* court might have reached a different result if it had been aware of the DOL interpretation. Fourth, the Tenth Circuit applied the "economic reality" test to determine FLSA employee status, not the common law agency test that determines employee status under Title VII.

Respondent is not aware of any other pending litigation raising the questions presented for review. Thus, there is no need for this Court to grant certiorari to

secure uniformity among the decisions of the courts of appeals. Indeed, the grant of certiorari on a novel issue in the absence of a conflict would deprive the Court of the benefit of a fully ventilated discussion of the issue among the courts of appeals. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari) ("Often a denial of certiorari will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court'") (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983)).

2. The court of appeals did not decide a federal question in a way that conflicts with a decision by a state court of last resort

Another circumstance in which this Court may grant certiorari is when a court of appeals has decided "an important federal question in a way that conflicts with a decision by a state court of last resort." Sup. Ct. R. 10(a). Petitioners assert that the court of appeals decision is inconsistent with the decision by the New York Court of Appeals in *Brukhman v. Giuliani*, 94 N.Y.2d 387 (2000). City's Petition for Certiorari ("Pet.") 23.

Petitioners' contention is entirely unavailing. *Brukhman* did not involve Title VII or *any* federal question, but rather involved only the purely state law issue of whether "the prevailing wage provision of the New York State Constitution" applies to WEP workers. *Id.* at 390. While the New York Court of Appeals held that the prevailing wage provision was inapplicable, its decision involved only this state law question. In addressing this state law question, the *Brukhman* court neither invoked nor applied the common law agency test that determines employee status under Title VII.

Additionally, as the Second Circuit decision below explained in distinguishing *Brukhman*:

> [T]he New York Constitution grants special economic rights to certain classes of workers, *i.e.*, they must receive the prevailing wage in the community for the work they perform if the employer receives a public works contract. Title VII in contrast accords the basic civil right of freedom from discrimination to all employees employed by covered employers. In light of the very different scope of Section 17 [of the State Constitution] and Title VII, it would be foolhardy to assume that the New York Court of Appeals would extend its interpretation of the prevailing wage provision to Title VII.

Pet. App. A21-22.

C. Petitioners do not present any compelling reason for granting certiorari

This Court may also grant certiorari for "compelling reasons" other than those delineated in the Court's rules. Sup. Ct. R. 10. The City contends that the court of appeals decision "has limited the City's ability to conduct the [WEP] program in a manner optimally calculated to serve its intended purpose," Pet. 20, and apparently argues that this alleged result is a compelling reason for granting the petition.

However, the court of appeals decision in no way inappropriately hinders the City's ability to administer the WEP program. The decision holds only that WEP

workers may have a remedy under Title VII for sexual or racial discrimination. To the extent that the result of the decision is to reduce discrimination in the WEP program, this in an appropriate limitation on WEP administration. Indeed, the City acknowledges that discrimination against WEP workers is illegal under a state law provision, and asserts that the "City is strongly committed to enforcing this provision and to preventing discrimination against WEP participants." Pet. 4 n.4. The City offers no reason to conclude that the court of appeals decision will hinder, rather than help, the City in accomplishing its anti-discrimination goals.

In support of its hindrance argument, the City asserts that if WEP workers can be employees within the meaning of Title VII, they can also be employees with a right to unionize under the National Labor Relations Act (NLRA), and that an attempt by WEP workers to unionize "could cripple WEP," Pet. 20, a sweeping assertion for which the City offers no evidence. However, the instant case neither addresses nor decides employee status and the right to unionize under the NLRA. If possible unionization is the City's real concern, the City should wait for a case involving unionization to argue these matters.

D. Review by this Court might have no prospective effect as the federal welfare statute at issue in this case may not continue in its present form beyond March 31, 2005

As enacted by PRWORA, the TANF program was scheduled to expire on September 30, 2002. Over the past two years Congress has considered but not enacted a long-term reauthorization. In lieu of a long-term reauthorization, Congress has enacted eight short-term

extensions of TANF, continuing funding and the authority for program activities without program changes. The latest in this series of short-term extensions, Pub. L. No. 108-308, 118 Stat. 1135 (2004), extends TANF until March 31, 2005.

This Court's rules indicate that this Court grants certiorari to consider "important" questions. Sup. Ct. R. 10. Given the TANF program's uncertain future, a decision by this Court on the matter presented here for review might have only retrospective effect. Consequently, the matter presented for review is not the type of "important" matter that merits review by this Court. *Cf. Murel v. Baltimore City Criminal Ct.*, 407 US 355, 358 (1972) (dismissing certiorari as improvidently granted in view of pending revision of the statute at issue). Furthermore, as it seems highly likely that Congress will resolve TANF's future status before a final judgment in the underlying case as a whole, this Court would be better able to determine the importance of the matter presented for review following final judgment, should petitioners at that time still desire to seek review.

II. The Court of Appeals Decision Was Correct

The City argues that this Court should grant certiorari because the court of appeals decision was erroneous. Pet. 21. However, this Court generally does not grant certiorari just because the decision below may be erroneous. *See, e.g, Ross v. Moffit*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (the jurisdiction of the Supreme Court to review cases by way of certiorari "was not conferred upon this Court

merely to give the defeated party in the Court of Appeals another hearing"). Moreover, the decision below was correct.

A. The court of appeals correctly decided that WEP workers may qualify as employees under Title VII

This Court has repeatedly instructed the lower courts to apply common law agency principles to determine if an individual qualifies as an employee where, as in the case of Title VII, the statute containing the term does not helpfully define it. *Clackamas Gastroenterology Assocs., P. C., v. Wells*, 538 U.S. 440, 444-45 (2003); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992); *Community for Creative Non-Violence*, 490 U.S. at 739-40. Under Second Circuit Title VII precedent, before applying the common law agency test, a putative employee must meet a threshold test of receipt of remuneration from the putative employer. If the remuneration test is satisfied, employee status is then determined by applying the common law agency principles. *Compare Pietras v. Bd. of Fire Comm'rs*, 180 F.3d 468, 471, 473 (2d Cir. 1999) (volunteer firefighter who receives no salary but who is entitled to "(1) a retirement pension, (2) life insurance, (3) death benefits, (4) disability insurance, and (5) some medical benefits" may satisfy the remuneration requirement), *with York v. Ass'n of the Bar*, 286 F.3d at 126 (bar association volunteer's receipt of benefits merely incidental to the volunteer activity, such as "clerical support and networking opportunities," does not satisfy the remuneration requirement), *and O'Connor v. Davis*, 126 F.3d 116 (student intern who receives no remuneration from the putative employer does not satisfy the remuneration requirement).

This Court has not addressed the specific issue of whether remuneration is always necessary for employee status, as the Second Circuit has held. However, neither petitioners or respondents herein challenge this principle, and indeed the City focuses on the remuneration issue, seeming to "tacitly concede," as the court of appeals suggests, Pet. App. A16, that the plaintiff WEP workers do otherwise qualify as employees under the common law agency test.

The City contends that the court of appeals misapplied the Second Circuit's remuneration principle. This contention does not merit this Court's consideration. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.") Moreover, the City's contention is incorrect.

The City bases its misapplication argument on the assertion that "[b]enefits that are not contingent upon the performance of work cannot be deemed payment for that work." Pet. 26. However, the court below correctly found that once a TANF recipient is assigned to perform work in the WEP program, the share of the household's cash payment attributable to her *is* contingent on the performance of work. Pet. App. A16 ("A plaintiff who unjustifiably refused to work would lose the portion of the family's grant attributable to her.") The City can not reasonably dispute this fact and at least tacitly concedes it. *See* Pet. 25 ("Refusal to comply with any of these requirements may lead to a reduction or termination of benefits.") The City also implicitly concedes that WEP workers are covered by workers' compensation and are reimbursed for their child care and transportation costs. *See id.* at 26. These conceded forms of remuneration are

exactly what the court of appeals relied on in correctly deciding that the remuneration test was satisfied. Pet. App. A16-17.

Furthermore, as the court of appeals decision explains, the conclusion that WEP workers may qualify as employees is supported by the position of the EEOC, the agency charged with enforcing Title VII. *See* Pet. App. A17-19 (quoting EEOC Notice No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, at Q&A No. 5 (Dec. 3, 1997), *available at* http://www.eeoc.gov/policy/docs/conting.html (last visited Nov. 28, 2004); and EEOC Compl. Man. (BNA) § 2-III(A)(1)(a), at 605:0009 (2002)). The EEOC's interpretation is "entitled to respect" to the extent it has the "power to persuade," pursuant to this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (deferring to the EEOC's interpretation of "employee" as including "former employee").

B. The court of appeals correctly decided that PRWORA does not preempt Title VII

The court of appeals correctly rejected the City's arguments that PRWORA preempted Title VII from applying to workers in the WEP program. Pet. App. A26-35. Petitioners no longer advance several arguments in support of preemption that they pressed below, but continue to make an "expressio unius est exclusio alterius" argument in favor of preemption. That argument is that the absence of Title VII in the non-discrimination statutes listed in 42 U.S.C. § 608(d) indicates a congressional intent to preempt Title VII.

42 U.S.C. § 608(d), Pet. App. A174-75, provides under the caption "Nondiscrimination provisions":

> The following provisions of law shall apply to any program or activity which receives funds provided under this part:
>
> (1) the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.)
>
> (2) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)
>
> (3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.)
>
> (4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)

The common link among the four listed statutes is that each prohibits discrimination in activities other than employment in programs or activities that receive federal assistance or, in the case of the Americans with Disabilities Act, that are operated by a public entity. As the court of appeals pointed out, these laws reach programs and activities "like education and vocational training that, due to the absence of an employment relationship, clearly are not subject to Title VII. Title VII, on the other hand, governs employment relationships whether federally funded or not." Pet. App. A27.

The court of appeals reasoned that the expressio unius maxim only applies "when the statute identifies 'a series of two or more terms or things that should be understood to go hand in hand' " (quoting *Chevron U.S.A., Inc., v. Echazabal*, 536 U.S. 73, 81 (2002)), thus raising the inference that a similar unlisted term was deliberately excluded. The court of appeals correctly concluded that the expressio unius maxim does not apply

in this instance because Title VII differs in its applicability from the listed statutes.

The City does not challenge the principle of law stated by the court of appeals that the expressio unius principle applies only when the omitted term goes hand in hand with the listed terms, but rather argues that the court of appeals misapplied the principle. However, as noted above, the asserted misapplication of a rule of law does not support certiorari review.

Moreover, the City is incorrect that the court of appeals misapplied the hand-in-hand principle. The City bases this argument on the fact that, like Title VII, two of the listed statutes have provisions that ban employment discrimination. However, unlike Title VII, but like the other listed statutes, these two statutes also have provisions that ban discrimination in activities other than employment. Section 608(d) thus falls far short of creating a "clearly expressed congressional intention" to preempt Title VII, the preemption standard correctly adopted by the court below. Pet. App. A26 (quoting *Morton v. Mancari,* 417 U.S. 535, 551 (1974)).

Furthermore, as the court of appeals decision explains, the no preemption conclusion is supported by the regulations implementing the PRWORA non-discrimination provision that have been issued pursuant to notice and comment by the two federal agencies responsible for PRWORA administration, DOL and the United States Department of Health and Human Services. *See* Pet. App. A31-35. These regulations deserve deference. As the court of appeals concluded, "[l]egislative regulations issued after notice and comment rulemaking, as these regulations were, are given 'considerable weight'." *Id.* at A32 (quoting *Chevron,*

U.S.A., Inc. v Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

Additionally, as the court of appeals decision also explains, Pet. App. A29-31, the no preemption conclusion is supported by PRWORA's legislative history. In May 1997, DOL issued a guide implementing PRWORA indicating that the FLSA and federal anti-discrimination laws "apply to welfare recipients as they apply to other workers. The new welfare law does not exempt welfare recipients from these laws." DOL Guide, *How Workplace Laws Apply to Welfare Recipients*, at Q&A No. 1 (May 1997, revised Feb. 1999), *available at* http://www.dol.gov/asp/w2w/welfare.htm (last visited Nov. 28, 2004). Congress subsequently considered but did not enact a provision specifically designed to override this part of the DOL Guide. Pet. App. A30-31. As the court of appeals stated, the failure of Congress to act when it had knowledge of DOL's interpretation suggests that DOL's interpretation is correct. *Id.* at A31.

CONCLUSION

The petition for a writ of certiorari should be denied.

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(3)

No. 04-464

In the Supreme Court of the United States

CITY OF NEW YORK, NEW YORK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether welfare recipients required to participate in New York City's Work Experience Program (WEP) are employees within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

2. Whether a provision in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 42 U.S.C. 608(d), that specifies that four statutes other than Title VII apply to a program that receives assistance under PRWORA precludes the application of Title VII to WEP participants.

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CITY OF NEW YORK, NEW YORK, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A52) is reported at 359 F.3d 83. The opinion of the district court (Pet. App. A55-A74) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2004. A petition for rehearing was denied on May 27, 2004 (Pet. App. A53-A54). The petition for a writ of certiorari was filed on August 10, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) established

a new program for providing assistance to needy families—Temporary Assistance for Needy Families (TANF). That program is designed to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage." 42 U.S.C. 601(a). Under TANF, States that receive federal funds may provide needy parents and caretakers with cash assistance, but that assistance must be conditioned upon the recipient's participation in "work activities." 42 U.S.C. 607(d) and (e)(1).[1] If an eligible parent or caretaker refuses without good cause to satisfy that work requirement, the State must reduce or terminate assistance. 42 U.S.C. 607(e)(1).

New York State administers TANF through local districts, such as the City of New York. Pet. App. A6. In New York City, one of the work activities in which TANF recipients may participate is the Work Experience Program (WEP). *Id.* at A57-A58 Under WEP, the New York City Human Resources Administration

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[1] PRWORA defines "work activities" to include "(1) unsubsidized employment; (2) subsidized private sector employment; (3) subsidized public sector employment; (4) work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available; (5) on-the-job training; (6) job search and job readiness assistance; (7) community service programs; (8) vocational educational training (not to exceed 12 months with respect to any individual); (9) job skills training directly related to employment; (10) education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency; (11) satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate; and (12) the provision of child care services to an individual who is participating in a community service program." 42 U.S.C. 607(d); see also N.Y. Soc. Serv. Law § 336(1) (McKinney Supp. 2005).

(HRA) assigns TANF recipients to work for public and nonprofit agencies. *Id.* at A58. Adults without dependent children who receive state-funded public assistance also participate in that program. *Id.* at A6. The number of hours each WEP worker is required to work is determined by dividing the monetary amount of that individual's TANF or state benefit by the minimum wage. *Id.* at A58. The agencies to which WEP workers are assigned establish work schedules, assign tasks, train workers, and supervise their work. *Ibid.*

As required by PRWORA and New York law, each WEP worker's cash assistance is contingent upon compliance with the terms of that person's work assignment. Pet. App. A6-A7. A WEP worker who satisfactorily performs the required job duties receives cash assistance. *Ibid.* Conversely, if a WEP worker fails or refuses to work without good cause, that individual receives either less or no cash assistance. *Ibid.* WEP workers also receive reimbursement for transportation costs to and from their WEP assignments, payment of authorized child care expenses, and workers' compensation coverage. *Id.* at A58.

2. The United States filed a complaint against the City of New York and the New York City Housing Authority, alleging that Maria Gonzalez, Tammy Auer, Theresa Caldwell-Benjamin, and Tonja McGhee were subjected to sexual or racial harassment while working at their WEP job assignments, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. A58. All four women intervened.[2] Norma Colon filed a similar Title VII suit against the City of

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[2] McGhee settled her claims with petitioners and is no longer a party to this case.

New York. *Id.* at A11-A12. The district court granted the City's motion to dismiss. *Id.* at A55-A74. The court held that in order to qualify as an "employee" protected by Title VII, a worker must receive remuneration. *Id.* at A71. The court further held that the individual plaintiffs did not receive remuneration. *Id.* at A71-A72.

3. The court of appeals reversed. Pet. App. A1-A52. The court noted that the Second Circuit applies a two-part test to determine whether a worker qualifies as an employee for purposes of Title VII. First, to qualify as an employee, a worker must receive remuneration. *Id.* at A15. Once that threshold requirement is satisfied, the court considers 13 factors derived from the common law of agency to determine if an employment relationship exists. The most important of those 13 factors is the extent to which the hiring party controls the manner and means by which the worker completes assigned tasks. *Id.* at A15-A16.

Applying its two-part test, the court of appeals found that the individual plaintiffs' work was completely controlled by the agencies for which they worked, satisfying the common law agency standard. Pet. App. A16. The court of appeals further held that the individual plaintiffs' receipt of cash payments and food stamps constituted remuneration. *Id.* at A16-A17. The court explained that the individual plaintiffs received the cash payments and food stamps in return for their work, that those payments equaled the minimum wage times the number of hours worked, and that a plaintiff who unjustifiably refused to work would lose the portion of the grant attributable to her. *Id.* at A16. The court of appeals also concluded that the individual plaintiffs' receipt of transportation expenses, child care expenses, and eligibility for workers' compensation constituted

remuneration. *Id.* at A16-A17. The court of appeals rejected petitioner's reliance on *Johns* v. *Stewart*, 57 F.3d 1544 (10th Cir. 1995), and *Brukhman* v. *Giuliani*, 727 N.E. 2d 116 (N.Y. 2000), on the ground that those cases did not involve either Title VII or the PRWORA. Pet. App. A19-A22.

The court of appeals also rejected the City's contention that, under the principle of *expressio unius*, PRWORA's specification that four statutes other than Title VII apply to programs that receive assistance under PRWORA precludes the application of Title VII to WEP workers. Pet. App. A27. The court reasoned that because Title VII does not go "hand in hand" with the listed statutes, the *expressio unius* principle does not apply. *Ibid.* The court further reasoned that the City's argument amounted to a claim of implied preemption and that the specification of the four statutes did not show that Congress clearly intended to exclude WEP workers from the protection of Title VII. *Id.* at A26-A27.

Judge Jacobs dissented. Pet. App. A36-A52. He concluded that the benefits received by WEP participants do not amount to a form of compensation. *Id.* at A39-A48.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The interlocutory posture of the case and the absence of a permanent reauthorization to the underlying funding program also counsel against review. The petition for a writ of certiorari should therefore be denied.

1. Petitioners contend (Pet. 20-28) that the individual plaintiffs are not employees within the meaning of Title VII. That contention is without merit. As the court of appeals held (Pet. App. A16), because the individual plaintiffs' work was controlled by the various agencies for which they worked, and they received substantial remuneration for their work, they were employees within the meaning of Title VII.

Petitioners do not take issue with the court of appeals' holding that individuals who are subject to the control of an employer and who receive remuneration for their work are employees within the meaning of Title VII. Nor do they challenge the court of appeals' conclusion that the individual plaintiffs were subject to the control of the agencies for which they worked. Instead, they argue that the individual plaintiffs were not employees because they did not receive remuneration. As the court of appeals concluded, however, the individual plaintiffs received remuneration in two forms.

First, they received cash assistance that was conditioned upon the performance of their WEP work assignments. Specifically, if the individual plaintiffs complied with the terms of their WEP work assignments, they received cash assistance; if they failed without good cause to show up for or carry out their WEP duties, they received less or no cash assistance. See Pet. App. A16; 42 U.S.C. 607(e)(1) ("[I]f an individual in a family receiving assistance under the State program funded under this part refuses to engage in work required in accordance with this section, the State shall—(A) reduce the amount of assistance otherwise payable to the family pro rata (or more, at the option of the State) with respect to any period during a month in which the individual so refuses; or (B) terminate such assistance,

subject to such good cause and other exceptions as the State may establish."); N.Y. Soc. Serv. Law § 342(1) (McKinney Supp. 2005) ("[A]n individual who is required to participate in work activities shall be ineligible to receive public assistance if he or she fails to comply, without good cause, with the requirements of this title."). Second, the individual plaintiffs received significant indirect remuneration in exchange for their work. In particular, they received reimbursement for transportation costs to and from their WEP assignments, payment of certain child care expenses, and workers' compensation coverage. Pet. App. A16.

Petitioners challenge the court's conclusion that the individual plaintiffs received remuneration on three grounds. None is persuasive. First, petitioners contend (Pet. 22) that the cash assistance cannot be regarded as remuneration because a WEP worker's family continues to receive assistance even when the WEP worker fails to work as required. But as the court of appeals explained, "a plaintiff who unjustifiably refused to work would lose the portion of the family's grant attributable to her," so that "each plaintiff had to work in order to receive her share of the family grant." Pet. App. A16. Accordingly, under a "functional commonsense assessment," the cash assistance constitutes remuneration to the WEP worker. *Ibid.*

Second, petitioners mistakenly argue (Pet. 22) that 42 U.S.C. 608(c) shows that the cash assistance that WEP workers receive cannot be regarded as wages. Section 608(c) provides that "[a] penalty imposed by a State against the family of an individual by reason of the failure of the individual to comply with a requirement under the State program funded under this part shall not be construed to be a reduction in any wage paid to

the individual." 42 U.S.C. 608(c). As the court of appeals explained, Section 608(c) does not state that benefits are not wages, but only that a reduction in benefits should not be regarded as a reduction in wages. As such, it harmonizes the provision that allows an employer to sanction a recalcitrant worker with a loss of pay with the requirement that workers not be paid below the minimum wage. Pet. App. A24. Just as an ordinary worker does not suffer a wage reduction for minimum wage purposes simply because that individual's pay is docked, a WEP worker does not suffer a wage reduction when that individual is sanctioned with a loss of pay for failing to work as required. The cash payments received by both kinds of workers, however, are still wages. In any event, in order to qualify as an employee, it is not necessary that a worker receive wages; it is sufficient that the worker receive substantial job-related benefits. *Pietras* v. *Board of Fire Comm'rs*, 180 F.3d 468, 473 (2d Cir. 1999). The individual plaintiffs received substantial work-related benefits here.

Third, petitioners contend (Pet. 26) that the benefits at issue in this case cannot be regarded as remuneration because those benefits are "need-related," rather than "job-related." Those two categories, however, are not mutually exclusive. While the individual plaintiffs would not have been working in the WEP if they did not meet the applicable need standards, they were nonetheless working in the WEP in order to obtain cash assistance. The benefits were therefore "job-related" as well as "need-related."

Finally, all of petitioners' contentions fail to take into account that the principal purpose of considering whether a worker receives remuneration is to distinguish "employees" from "volunteers." *York* v. *Associa-*

tion of the Bar, 286 F.3d 122, 126 (2d Cir. 2002) (incidental benefits insufficient to show that worker received remuneration test because that would render all volunteer activity employment under Title VII). WEP workers are not volunteers. They are not cleaning city parks, maintaining public buildings, or doing office work as volunteers; they are receiving remuneration in exchange for their work. While the remuneration takes the form of welfare benefits, as opposed to a more conventional salary, WEP workers are still receiving money and benefits because they perform work. They are therefore employees within the meaning of Title VII.

2. Petitioners alternatively contend (Pet. 26-28) that 42 U.S.C. 608(d) makes Title VII inapplicable to WEP participants. In particular, they argue that because Section 608(d) identifies four federal nondiscrimination statutes that are applicable to work programs and activities receiving federal funds under TANF, and does not include Title VII in that list, Title VII does not apply to WEP participants. For the reasons discussed above, however, Title VII applies to WEP participants because WEP participants are employees as that term is used in Title VII. Because Title VII applies to WEP participants by its own terms, there was no need for Congress to specify in PRWORA that Title VII applies to WEP workers.

To the extent that petitioners are arguing that Section 608(d) preempts the application of Title VII to WEP workers, that argument is incorrect. A statute does not preempt a prior statute absent an express manifestation of a preemptive intent. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). And Section 608(d)

does not express Congress's manifest intent to preempt Title VII.

Nothing in Section 608(d) states that Title VII shall not apply to WEP workers. Nor is there any language stating that the statutes identified in Section 608(d) are the only nondiscrimination protections afforded to participants in workfare programs. Significantly, when Congress wishes to preempt the application of Title VII, it does so explicitly. See, *e.g.*, 42 U.S.C. 5055(a) (providing that VISTA volunteers "shall not be deemed Federal employees and shall not be subject to the provisions of laws relating to Federal officers and employees and Federal employment"). Title VII expresses this country's commitment to the principle that individual workers should not be subjected to discrimination on the basis of race and sex. Petitioners have not identified any reason that Congress would not have wanted WEP workers to receive that fundamental protection. The court of appeals therefore correctly held that Title VII applies to WEP workers.

3. Petitioners contend (Pet. 20) that the decision below conflicts with the Tenth Circuit's decision in *Johns* v. *Stewart*, 57 F.3d 1544 (1995). For several reasons, however, there is no conflict. First, that case did not raise the question whether a PRWORA worker is an employee within the meaning of Title VII. Instead, the question in *Johns* was whether plaintiffs who received public assistance by participating in state-run work programs were "employees" within the meaning of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et. seq.* 57 F.3d at 1559. Second, the Tenth Circuit did not establish a categorical rule that persons who receive public assistance by participating in a work program can never be employees within the meaning of the FLSA.

Instead, that court examined all the facts and circumstances to determine whether the workers at issue were employees, an approach that is consistent with the approach adopted by the court below. Third, some of the factors relied on by the Tenth Circuit in *Johns* are not present in this case. For example, the named plaintiffs in *Johns* did not receive any benefits from their alleged employer, while the individual plaintiffs here received benefits directly from the City. In addition, the program at issue in *Johns* was not a work program like the WEP, but rather a program involving participation in a broad range of adult education, short-term skills training, community work, and job search activities. 57 F.3d at 1558. There is therefore no square conflict between *Johns* and the decision below.

Petitioners also err in contending (Pet. 23) that the decision below conflicts with the New York Court of Appeals' decision in *Brukhman* v. *Giuliani*, 727 N.E.2d 116 (2000). That case did not involve the definition of employee under Title VII. Rather, based on the terms and legislative history of a state constitutional provision concerning prevailing wages, the New York Court of Appeals held that WEP participants are not employees under that state constitutional provision. *Id.* at 119-122. That state law determination has no bearing on the question presented here.

4. Certiorari is also unwarranted because this case is in an interlocutory posture. The court of appeals held that the district court had erred in granting a motion to dismiss the complaint and remanded the case for trial on the merits. Should petitioners prevail on the merits, the questions they now seek to present will become academic. Should respondents prevail on the merits, petitioners will be able to present those issues to this

Court following entry of a final judgment. This Court ordinarily awaits the entry of final judgment before granting review, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967), and there is no reason to depart from that practice here.

Finally, Congress authorized the TANF program to operate only until fiscal year 2002. 42 U.S.C. 603. While Congress has enacted multiple short-term extensions of the TANF program, it has not reauthorized the program. See Welfare Reform Extension Act, Pt. VIII, Pub. L. No. 108-308, 118 Stat. 1135-1136 (extending TANF until March 2005). The uncertainty concerning the reauthorization of the TANF program is yet another reason that certiorari is unwarranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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